Dec 8 1876
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 131.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

JOHN H. THOMPSON AND OTHERS, CREDITORS OF WILLIAM J. McFREELY AND JOHN B. HOPPER.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED OCTOBER 13, 1874.

Dec 19 1876
Dismissed
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1 STATE OF MARYLAND, *sct:*

At a court of appeals of the State of Maryland, begun and held at the city of Annapolis, on the first Monday in October, it being the third day of the said month, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States of America the ninety-fifth:

Present: The honorable James L. Bartol, chief judge; Judges James A. Stewart, Oliver Miller, George Brent, Richard H. Alvey, Richard Grason, William P. Maulsby, John M. Robinson; James S. Franklin, clerk,

Among other were the following proceedings, to wit:

2 THE UNITED STATES OF AMERICA
vs.
JOHN H. THOMPSON ET AL., CREDITORS OF WILLIAM T. McFREELY AND JOHN B. HOPPER.

Be it remembered, that now here, on the first Monday in April, being the fourth day of the said month, in the year of our Lord one thousand eight hundred and seventy, the judges of the second judicial circuit of Maryland, in pursuance of the directions of the act of assembly in such case made and provided, transmitted to the court of appeals here the record of proceedings of a cause which was lately depending before them in the circuit court for Queen Anne's County, sitting in equity, between the United States of America, complainant, and John H. Thompson
3 and others, creditors of William T. McFreely and John B. Hopper, respondents, and wherein the said circuit court in equity on the nineteenth day of May, eighteen hundred and sixty-nine, passed an order ratifying account No. 2 of auditor's report in said cause, and rejecting account No. one of said report, and from which said order the said United States of America appealed to the court of appeals here, the tenor of which said record of proceedings is in form following, to wit:

4 Bill of complaint filed in circuit court of Queen Anne's County, on the 6th day of April, eighteen hundred and sixty-seven.

WILLIAM J. McFREELY
vs.
JOHN B. HOPPER AND WILLIAM D. WRIGHT.

To the honorable John M. Robinson, judge of the circuit court for Queen Anne's County:

The bill of complaint of William J. McFreely, of Queen Anne's County, humbly shows that in the month of December, in the year eighteen hundred and sixty, your orator, and a certain John B. Hopper, of the same county, entered into a parole agreement of copartnership, for the purpose of conducting a general cash and credit business, as traders and merchants, under the name and style of McFreely & Hopper, in the town of Centreville, in Queen Anne's County, and upon equal terms and shares as to profit or loss; that said business commenced immediately after the said agreement, under the direction of the said partners, and with a fair prospect of a successful issue, and was continued until the first day of January, eighteen hundred and sixty-six; that the purchasing of the goods for the said firm and the management of its financial affairs was, at an early period after the commencement of its business,

almost exclusively assumed by the said John B. Hopper, and permitted by your orator; that your orator, judging from the amount of business done by the said firm, and from the sums of money appearing to be due by its books, believed that the said firm had made money; that the representations of said John B. Hopper, from time to time, to your orator and others, confirmed this belief; that in the year 1865, your orator fearing that the credit of the said firm was becoming impaired, and believing that it had abundant assets to pay all its liabilities, insisted with the said John B. Hopper upon a speedy collection of all debts due to the said firm, and the payment of its indebtedness; that to facilitate collections and settlements it was agreed between the said John B. Hopper and your orator that the style of the said firm should be changed, and accordingly, on or about the first day of January, eighteen hundred and sixty-six, and with the assent of one William D. Wright, then a clerk in the employment of the said firm, and which assent was given on the express representations and promises of the said John B. Hopper and your orator that he should in no wise suffer thereby, your orator and the said John B. Hopper caused to be inserted in the public newspapers an advertisement setting forth that they had associated the said William D. Wright with them in their business as merchants, and that thereafter the business would be conducted under the name and style of McFreely, Hopper and Wright; that this arrangement was made with the express understanding and agreement that the said William D. Wright, while lending his name, should have no interest in the profits of the firm of McFreely, Hopper & Wright, and that he should in no way be responsible to the firm of McFreely & Hopper, or to the partners in that firm individually, for the stock of goods and other effects which passed from the firm of McFreely & Hopper to the firm of McFreely, Hopper & Wright. Your orator further represents that it was agreed that the said John B. Hopper should devote himself to winding up the affairs of the firm of McFreely & Hopper, while your orator would have a general charge of the affairs of the firm of McFreely, Hopper & Wright, and especially that he should purchase the goods for, and control the finances of, that firm.

Your orator further charges that the said John B. Hopper has grossly mismanaged the affairs of the firm of McFreely & Hopper; that without the knowledge and consent of your orator he has borrowed numerous and large sums of money on the credit of that firm from time to time, and has paid therefor heavy discounts or ruinous rates of interest; that your orator is ignorant of the uses to which the money thus raised has been applied; that there are now outstanding notes and other liabilities of the said firm, given and created by the said John B. Hopper, without the consent or knowledge of your orator, for large sums of money; that the said John B. Hopper has kept no record or statement or memoranda, accessible to your orator, whereby he can ascertain the liabilities of the said firm; that the credit of the said firm is destroyed, and the affairs of the firm of McFreely, Hopper & Wright greatly entangled and embarrassed by its connection with the firm of McFreely and Hopper, and that the said John B. Hopper has recently left his home and business, and gone to some place unknown to your orator.

Your orator further charges that he is desirous to prevent, if possible, any contest for precedence on the part of the creditors of the said firm, McFreely, Hopper & Wright, or of the said firm of McFreely and Hopper, and to have the assets of both of said firms applied to the payment of their respective debts, under the direction of a court of equity, and with as little accumulation of cost as possible.

In consideration of all which, and to the end that the defendants herein-

after named may answer the several matters and things hereinbefore charged, as fully and particularly as if they were herein again stated and they were thereto specially interrogated, and that a receiver or receivers may be appointed to take charge of all the partnership books and papers of account, goods and effects of both of the said firms of McFreely & Hopper and McFreely, Hopper & Wright, and to collect the debts due to said firms respectively, and to preserve and dispose of the same under the direction of this court, and that both of said partnerships may be declared to be dissolved, if they are not already dissolved, and that an account of the business of each may be taken under the direction of this court, and that the assets of the firm of McFreely, Hopper & Wright may be applied, in the first place, to the debts and liabilities of the said firm, other than the claim which the firm of McFreely and Hopper may have for stock transferred to the firm of McFreely, Hopper and Wright, and then to the said claim for stock so transferred, and that the assets and effects of said firm of McFreely and Hopper may be applied to the payment of its debts and liabilities; and should there be any residue after the payment of the debts of both of said firms, as herein prayed, that it may be divided between your orator and the said John B. Hopper, and that your orator may have such further and other relief as his case may require. May it please your honor to grant unto your orator a writ of subpœna against the said John B. Hopper and William D. Wright, commanding them to be and appear in this court at some certain day to be therein named, to answer the premises and abide by and perform such decree as may be passed therein.

And as in duty bound he will ever pray.

LLOYD TILGHMAN,
Solicitor for Complainant.

6 STATE OF MARYLAND,
Queen Anne's County, to wit:

On this 4th *fourth* day of April, 1867, before me, a justice of the peace of the State of Maryland, in and for Queen Anne's County aforesaid, personally appeared the within-named William J. McFreely, and made oath that the matters stated in the foregoing bill are true, to the best of his knowledge and belief.

A. M. ARLETT, *J. P.*

[Rev. stamp, 5 cts.]

Order of court appointing William McKenney, receiver, filed same day.

On the 30th day of April, in the year eighteen hundred and sixty-seven, the following answers were filed:

The answer of J. B. Hopper to the bill of complaint of W. J. McFreely, against him and W. D. Wright exhibited in the circuit court for Queen Anne's County.

This defendant agrees to the appointment of a receiver by the court, and is willing that the assets of the firms of McFreely & Hopper and McFreely, Hopper & Wright, be taken charge of by the court, and distributed according to the right and equity of the matter.

J. B. HOPPER,
By P. B. HOPPER, *his Solr.*

The answer of Wm. D. Wright to the bill of complaint of Wm. J. McFreely against him and John B. Hopper, in the circuit court for Queen Anne's County exhibited.

This defendant, for answer to so much of said bill of complaint as he

is advised is material and necessary for him to answer, says: that it is true, as stated in said bill of complaint, that the said complainant and the said John B. Hopper were doing business in the town of Centreville, under the style and name of McFreely & Hopper, for several years prior to the creation of the new firm of McFreely, Hopper & Wright; that at or about the time alleged in said bill of complaint, the said W. J. McFreely and the said John B. Hopper, for the purposes stated in the said bill of complaint, proposed to change the name and style of said firm, and proposed to this defendant that he would permit his name to be added as a member of the new firm, both of said parties assuring him at the time that he should not be personally responsible for any of the goods transferred by the old firm to the new firm, and that he should in no wise suffer thereby; they further assured him that the stock so transferred to the new firm, and the accounts to accrue by a sale of said goods, and the goods and merchandize subsequently purchased by the new firm should be held responsible in the first instance for the debts created by the new firm; by which said representations and assurances this defendant was induced to give his assent to becoming a member of the new firm. It is true, as stated in said bill of complaint, that he was not to share the profits of the new firm, but was to receive a stated sum and his board, which was not more than he was entitled to as clerk in their employment; he believed at the time of so giving his assent, that it was the best mode that could be adopted to enable the old firm to close up the old business, and having received the goods with the other partners, on the assurance that they should be held primarily responsible for the debts of the new firm, he did not see that there was any chance for loss or injury to himself, and hence he was induced to become a member of the new firm. He admits that the affairs of the firm of McFreely, Hopper & Wright are complicated, by reason of their con-
7 nection with the affairs of the firm of McFreely & Hopper, and thinks it proper that a receiver should be appointed to take charge of and manage the same; and he consents that the same shall be done, claiming, however, at the same time, that the goods, wares and merchandize on hand at the time of the appointment of a receiver, and the debts due the firm of McFreely, Hopper & Wright, shall be in the first instance applied to the debts created by that firm, and the residue to be applied to the debts of the old firm. In regard to the allegations of the bill of complaint—in regard to the other matters affecting the affairs of the firm of McFreely & Hopper, or the conduct of either or both of said partners in reference thereto—this defendant being advised that it is not material that he should answer thereunto, does neither admit or deny the same. He prays to be hence dismissed, &c.

W. D. WRIGHT,
By P. B. HOPPER, *his Solr.*

On the 25th day of June, in the year 1868, the following petition and order thereon was filed:

In the circuit court for Queen Anne's Co., sitting as a court of equity.

WM. J. McFREELY
vs.
HOPPER & WRIGHT.

To the honorable the judges of the circuit court for Queen Anne's County.

The relation of the undersigned to some of the parties to this cause,

and some private consideration, render it proper that I should ask the indulgence from the court of not acting as auditor therein, and that your honors appoint a special auditor to state such accounts as may be requisite for the distributing of the funds belonging to the cause.

P. B. HOPPER, *Auditor.*

Upon the above application, it is this 25th day of June, 1868, ordered, that P. B. Hopper, auditor of this court, be excused from his duties as the officer of this court, of stating the necessary accounts that may be required for the distribution of the funds belonging thereto, and that Madison Brown, esqr., be and he is hereby appointed special auditor to state all accounts that may be required, as well as discharge such other duties as may devolve upon him as special auditor.

JOSEPH A. WICKES.

On the 9th day of December, 1868, the following petition was filed, to wit:

In the circuit court for Queen Anne's County, in equity.

WILLIAM J. McFREELY
vs.
JOHN B. HOPPER AND WILLIAM D. WRIGHT.

To the Hon. Jno. M. Robinson, chief-judge, and Hons. Jos. A. Wickes and Frederick Stump, associate judges of the circuit court for Queen Anne's Co.

The petition of the United States of America, by E. A. Rollins, Commissioner of Internal Revenue, humbly shows, that by an order of
8 this honorable court, passed in the above-entitled cause, a certain William McKenney was appointed receiver to take charge and possession of the goods, wares, merchandise, papers, and effects belonging to the firms of McFreely & Hopper, and McFreely, Hopper & Wright, and to collect the outstanding debts due the said firms.

Your petitioner further states that he is credibly informed and verily believes, and so charges, that the said firms of McFreely, Hopper & Wright and McFreely & Hopper were one and the same; your petitioner further states that the said firm is indebted to your petitioner, the United States of America, in the sum of twenty-five hundred and thirty-seven dollars, with interest thereon from the second day of September, 1866, for and on account of internal-revenue stamps and *and* sundry checks drawn in favor of or endorsed to one *one* John H. Thompson, deputy collector internal revenue for the first congressional district of Maryland, for the use of the United States, and sundry sums of money obtained from the said Thompson by false and fraudulent pretences; that the said internal-revenue stamps and checks were left with or entrusted to the care of the said firm by the said Thompson, and that at the time of so doing the said firm was informed and notified that the said stamps, checks, and money were the property of the said United States of America. Your petitioner further states that he is advised that the said United States is entitled to have the aforesaid sum of money and interest thereon allowed as a preferred claim against the fund in the hands of said receiver. Your petitioner therefore prays that your honors will pass an order authorizing and directing the special auditor in the above-named cause to prepare two accounts, in one of which the claim of the said United States shall be allowed as a preference claim, and that the

said special auditor be directed to take the examinations and evidences of such witness or witnesses as may be produced before him touching the claim of the said United States, and that said testimony shall be transmitted with said accounts to this honorable court for its further order. And as in duty, &c.

GEORGE M. RUSSUM,
Solr. for U. S.

On the 14th day of December, 1868, the following order was filed:

Circuit court for Queen Anne's County, in equity.

WILLIAM J. McFREELY
vs.
JOHN B. HOPPER, WILLIAM D. WRIGHT.

The aforegoing petition of E. A. Rollins, Commissioner of Internal Revenue, being read and considered, it is by me, Joseph A. Wickes, associate judge of the circuit court for Queen Anne's County, and by the authority of said court, ordered, adjudged, and decreed that Madison Brown, esqr., special auditor in the above cause, state two accounts between the receiver and the fund in the above cause, in one of which he shall allow the claim of the said petitioner as a preference claim, and in the other he shall distribute the fund among all the creditors according to their priorities, and that he take the examination and evidences of such witnesses as may be produced before him by any party interested in relation to the claim of said E. A. Rollins, and transmit the same with said accounts to this court for its further order, and that the auditor give notice to the creditors, by a notice published for two weeks in one or more newspapers published in Queen Anne's County, that
9 he will take testimony in the case on a day and at a place to be named by him in said notice.

J. A. WICKES.

DECEMBER 11, 1868.

On the 2d day of May, 1869, the following certificates and exhibits were filed:

Be it remembered that C. Delano, esq., who certified the annexed accounts, is now, and was at the time of doing so, Commissioner of the Internal Revenue, and that full faith and credit are due to his official attestations.

In testimony whereof I, George S. Boutwell, Secretary of the Treasury of the United States, have hereunto subscribed by name and caused to be affixed the seal of this Department, at the city of Washington, this seventh day of May, in the year of our Lord 1869.

{ Place for the seal of the Treasury Dept. of the U. S. }

GEO. S. BOUTWELL,
Secretary of the Treasury.

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, May 7th, 1869.

I hereby certify that the annexed paper writings, marked respectively A and B, are full, true, and correct copies from the records and files of this office.

C. DELANO,
Commissioner of Int. Revenue.

A.

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, May 7, 1869.

In the account of J. T. McCullough, State collector of internal revenue for the 1st district of Maryland:

Balance due the United States per Fifth Auditor's report, No. 3094	$108,818 82
Balance due the United States, per statement herewith	72,629 31
Difference to the collector's credit	36,189 51

Explained thus:

Amounts to collector's credit included in statement herewith, but not considered in the Fifth Auditor's report, viz:

*Taxes collected by W. J. Brittingham and George R. Howard on lists transferred	29,305 08
Taxes collected by W. H. Smith on lists transferred	6,884 43
Difference as above stated	36,189 51

10 *J. T. McCullough, collector of the 1st dist. of Maryland, in account with the United States,* DR.

To annual list for 1862	25,817 36
" September list for 1862, form 23½	1,995 80
" October " " " " "	1,063 00
" November " " " " "	1,227 47
" December " " " " "	833 95
" January " " 1863 " "	1,241 72
" February " " " " "	1,020 68
" March " " " " "	1,834 35
" April " " " " "	2,019 16
" May " " " " "	1,179 96
" Annual " " " " "	46,714 94
" June " " " " "	1,715 68
" July " " " " "	1,175 61
" August " " " " "	1,454 51
" September " " " " "	2,248 03
" October " " " " "	1,888 77
" November " " " " "	2,571 24
" December " " " " "	1,743 96
" January " " 1864 " "	1,522 74
" February " " " " "	1,770 94
" March " " " " "	3,437 91
" April " " " " "	1,660 70
" May " " " " "	1,878 67
" " " " " " 59	14 70
" Annual " " " " 23½	75,195 96
" June " " " " "	1,708 98
" " " " " " 59	30 14
" July " " " " 23½	5,045 67
" " " " " " 59	1,488 86
" August " " " " 23½	9,369 91
" " " " " " 59	2,515 17
" " " " " " 61	462 00

* The amount collected by each respectively cannot at present be stated.

"	September	"	"	"	"	23½	5,039 26
"	"	"	"	"	"	59	2,563 89
"	October	"	"	"	"	23½	3,522 16
"	"	"	"	"	"	59	2,036 23
"	"	"	"	"	"	61	2,794 13
"	Special inc.	"	"	"	"		81,944 90
"	November	"	"	"	"	23½	4,694 71
"	"	"	"	"	"	59	1,430 89
"	"	"	"	"	"	61	3,105 75
"	December	"	"	"	"	23½	4,572 90
"	"	"	"	"	"	59	2,536 88
"	"	"	"	"	"	61	4,758 00
"	January	"	"	1865	"	23½	3,202 83
						Amount carried forward	326,051 07

11 1865. DR.

To am't bro't forward						326,051 07
"	January	list	1865,	form	59	3,978 68
"	"	"	"	"		10,358 26
"	February	"	"	"		2,850 25
"	"	"	"	"		1,704 30
"	"	"	"	"		365 25
"	March	"	"	"		3,246 91
"	"	"	"	"		1,229 34
"	April	"	"	"		3,188 37
"	"	"	"	"		1,309 95
"	May	"	"	"		3,579 94
"	"	"	"	"		5,808 68
"	Annual	"	"	"		45,496 61
"	June	"	"	"		3,191 08
"	"	"	"	"		1,101 80
"	July	"	"	"		2,988 56
"	"	"	"	"		2,704 48
"	August	"	"	"		5,879 25
"	"	"	"	"		6,891 91
"	September	"	"	"		5,567 52
"	"	"	"	"		3,125 01
"	October	"	"	"		4,775 32
"	"	"	"	"		3,989 36
"	November	"	"	"		8,260 53
"	"	"	"	"		4,922 51
"	December	"	"	"		6,411 11
"	January	"	1866	"		9,299 33
"	February	"	"	"		8,806 08
"	March	"	"	"		6,390 85
"	April	"	"	"		10,372 45
"	May	"	"	"		11,915 13
"	Annual	"	"	"		103,328 86
"	June	"	"	"		7,199 66
"	July	"	"	"		5,717 57
"	August	"	"	"		8,269 68
"	September	"	"	"		337 11
"	October	"	"	"		12 50
"	November	"	"	"		77 38
						740,472 65

12 *J. T. McCullough, collector of the 1st dist. of Maryland, in account with the United States,* CR.

1863.							
Feb'y	4.	By C. D.	No.	109,	H. W. Hoffman	4,908	39
Mar.	10.	" "	"	140,	"	1,858	76
"	"	" "	"	852,	A. McIntyre	7,349	64
July	29.	" "	"	1045,	"	5,000	00
Nov.	10.	" "	"	536,	H. W. Hoffman	10,000	00
Dec.	2.	" "	"	564,	"	10,000	00
1864.							
Jany.	23.	" "	"	1868,	A. McIntyre	10,000	00
Mar.	16.	" "	"	190,	"	5,000	00
May	21.	" "	"	540,	"	10,000	00
"	"	" "	"	620,	"	15,000	00
July	22.	" "	"	752,	"	10,000	00
Sept.	10.	" "	"	949,	"	14,000	00
Octob'r	28.	" "	"	1137,	"	5,000	00
Dec.	3.	" "	"	1260,	"	5,000	00
1865.							
Jany.	4.	" "	"	1066,	H. W. Hoffman	8,000	00
"	5.	" "	"	1340,	A. McIntyre	12,000	00
"	30.	" "	"	430,	J. S. Norris	20,000	00
Feby.	23.	" "	"	722,	M. McMicharts	20,000	00
Mar.	14.	" "	"	498,	J. S. Norris	50,000	00
May	19.	" "	"	607,	"	7,600	00
"	20.	" "	"	608,	"	20,000	00
June	30.	" "	"	32,	Central N. B. Phila	20,000	00
Aug.	11.	" "	"	69,	"	5,000	00
"	29.	" "	"	770,	First N. B., Baltimore, Md.	5,048	79
Sept.	12.	" "	"	84,	Central N. B. Phila., Penn.	6,297	00
"	25.	" "	"	824,	First N. B., Baltimore, Md.	10,000	00
Oct.	2.	" "	"	1,	Nat. Ex. Bank	10,000	00
"	6.	" "	"	98,	Central N. B. Phila., Penn.	10,000	00
"	14.	" "	"	5,	Nat. Ex. Bk., Baltimore, Md.	31,150	00
Novr.	4.	" "	"	888,	First N. B., Baltimore, Md.	6,000	00
"	11.	" "	"	120,	Central N. B., Phila., Penn.	10,000	00
"	27.	" "	"	29,	Nat. Ex. Bk., Baltimore, Md.	12,500	00
"	29.	" "	"	933,	First N. B., Baltimore, Md.	18,000	00
Dec.	18.	" "	"	963,	First N. B., Baltimore, Md.	20,000	00
"	28.	" "	"	980,	First N. B., Baltimore, Md.	6,400	00

13

						CR.	
1866.							
Jany.	25.	By C. D.	No.	69,	Nat. Ex. Bk., Baltimore, Md.	10,000	00
Feby.	26.	" "	"	88,	Nat. Ex. Bk., Baltimore, Md.	12,574	13
Mar.	29.	" "	"	113,	Nat. Ex. Bk., Baltimore, Md.	15,000	00
April	11.	" "	"	124,	Nat. Ex. Bk., Baltimore, Md.	10,000	00
"	26.	" "	"	138,	Nat. Ex. Bk., Baltimore, Md.	7,736	00

May	4.	"	"	"	144, Nat. Ex. Bk., Baltimore, Md. 7,262 93
"	15.	"	"	"	156, Nat. Ex. Bk., Baltimore, Md. 6,645 12
"	24.	"	"	"	164, Nat. Ex. Bk., Baltimore, Md. 5,355 10
June	1.	"	"	"	169, Nat. Ex. Bk., Baltimore, Md. 4,007 00
"	12.	"	"	"	178, Nat. Ex. Bk., Baltimore, Md. 5,300 00

Amount carried forward 504,992 90

1866.

By amount bro't forward 504,992 90

June	29.	"	C. D.	No.	190,	Nat. Ex. Bk.,	Balto., Md.	12,311 42
July	11,	"	"	"	202,	"	"	4,352 65
"	"	"	"	"	203,	"	"	162 67
"	25.	"	"	"	212,	"	"	6,302 29
Aug.	10.	"	"	"	231,	"	"	3,127 50
"	21.	"	"	"	238,	"	"	3,546 56
"	30.	"	"	"	243,	"	"	1,883 88
Sept.	8.	"	"	"	247,	"	"	3,307 96
"	20.	"	"	"	254,	"	"	1,563 47
"	26.	"	"	"	258,	"	"	1,329 26
Oct.	1.	"	"	"	263,	"	"	19,712 60
"	15.	"	"	"	272,	"	"	6,143 51
Nov.	5.	"	"	"	294,	"	"	11,117 72

1865.

Aug.	25.	"	tax on salaries	11 25		
"	"	"	" " " "	88 73		
Sept.	14.	"	" " " "	61 03		
Dec.	13.	"	" " " "	103 48		
"	18.	"	" " " "	2 95		
					267 41	

By balance found due J. T. McCullough, on settlement of his acct. as disbursing agent, and carried *and carried* by counter-warrant to the credit of his rev. acct. 553 58

14 1865. CR.

By amt. in favor of J. T. McCullough, for Fifth Auditor's report on assessor's account No. 5101, and carried by counter-warrant to the credit of J. T. McCullough's rev. account 689 00

" disbursements to June 30th, 1865, viz:

Payments made on Commissioner's drafts in favor of assr.	8,241 11
Payments made on Commissioner's drafts for assr.'s stationery	75 50
Payments made on Commissioner's drafts refunding taxes.	225 40
Payments made to asst. assrs. and tax on salaries deposited	20,094 94
Collector's net compensation and amt. paid for stationery.	10,364 89
" amount of taxes abated by the Commissioner	11,257 61
" " " " collected by W. J. Brittingham and Geo. R. Howard on lists transferred to them,	29,305 08

" " " " collected by W. H. Smith on lists transferred to him		6,884 43
" balance due the United States, viz:		
" cash		56,250 55
" uncollected taxes		16,378 76
		740,472 65

On the third day of May, eighteen hundred and sixty-nine, the following auditor's report and accounts were filed:

WM. J. McFREELY
vs.
JNO. B. HOPPER AND WM. D. WRIGHT.

To the honorable judges of the circuit court for Queen Anne's County:

The undersigned, appointed special auditor in the above case, reports to your honors that he has carefully examined the proceedings therein, and taken some testimony in regard to the claims of certain creditors and the two firms of McFreely & Hopper and McFreely, Hopper & Wright, which is herewith reported. He has come to the conclusion that the whole amount of assets reported by William McKenney, receiver, ought to be distributed in equal proportion between the general creditors of both firms. From the bill, answer, and evidence of Wm. J. McFreely, Wm. D. Wright, and John H. Thompson it appears that the firm of McFreely & Hopper, towards the close of 1865, became much embarrassed, and to enable them to settle up their old business, and still continue in business, they proposed to Wm. D. Wright to borrow the use of his name, so as to change the style of the firm from McFreely & Hopper to McFreely, Hopper & Wright, without any change of
15 partners or any addition of capital. To this Wm. D. Wright consented, on their promise that as he was not to be entitled to share the profits, so also he should be secured from all responsibility, and to this end he stipulated with J. B. Hopper and Wm. J. McFreely that all the stock on hand of the old firm, and sales accruing therefrom, as well as all goods bought by the new firm, and the proceeds of their sales, should first be applied to the liabilities of the new firm. The essential element wanting in this agreement was the consent of the creditors of McFreely & Hopper, by which they were stripped of assets, the lowest estimate put on which is $12,000.00. For tho' the equities of the creditors grow out of the equities of the partners between themselves, it is impossible to discern any equity in the proposed arrangement. It seems to violate all sense of justice and fair dealing. Wm. D. Wright was the clerk of McFreely & Hopper when the arrangement was entered into, and continued to be their clerk up to April, 1867, when their business closed. He merely lent his name, by permitting it to be tacked on to theirs. His part of the agreement was fully performed when he allowed himself to be gazetted as partner; whereas their promises all lay in the future, and none of them were kept. His remedy for the breach is not against the creditors of McFreely & Hopper, but against W. J. McFreely & J. B. Hopper, with whom he contracted.

There is another circumstance of moment: Wm. McKenney, in his testimony, states that fully nine-tenths of the goods which came into his hands as receiver had belonged to the old firm of McFreely & Hopper. The whole appraisement was $3,831.66, and total sales $4,113.78.

On the basis of McKenney's estimate this would give to the old firm cash realized from sales about $3,700.00, and to the new firm about $415.00; and if one-third of the debts collected arose from the sales of the stock of McFreely & Hopper, it would make their share of the assets reported about $3,810.00, and the assets of the new firm about $640.00. Again, taking the testimony of Wm. J. McFreely and Wm. D. Wright together, it appears that the invoice of the stock of McFreely & Hopper footed up $18,633.77. True, they both express the opinion that the invoice was greatly in excess of the true amount, and that it should not have been more than $12,000.00. In this opinion McKenney concurs; but the auditor thinks all the opinions on this point are conjectures rather than evidence. The testimony is that the invoice was over $18,000.00, and that the amount actually entered on the books was $12,633.77, and was made not to correct any error in the addition, but by changing the figure 8 into a figure 2 showing they were invoiced at $18,633.77. The auditor thinks this last amount, tho' perhaps not strictly correct, approximates the truth very nearly. It is admitted that the intention was to invoice them at cost, and there certainly could have been no difficulty in ascertaining the cost-price. It is also admitted that the number of yards was correctly determined; but it is alleged the great error lay in overestimating the quantity and value of boots, shoes, vinegar, and some other articles, which, tho' true, could not, in the judgment of the auditor, have made any very great difference. The facts in the case, as deposed to by McFreely, show, in the opinion of the auditor, that the true amount of the stock on hand was not less than $18,000.00. His testimony is that the new firm's sales from 1st Jan'y '66, to 1st Jan'y '67 was $18,000.00, or about. Of these sales an accurate account was kept; and his opinion is that if a correct account had been kept for the next three months, the total sales for the whole time would have reached from $23,000 to 25,000.

16 The auditor will take the medium amount as true, and put the total sales at		$24,000 00
He further states the total purchases of the new firm to have been	$9,000 00	
Suppose this stock all sold at an average profit of 33⅓ per ct., making	3,000 00	
This would make, of sales of the new stock, the amount of		$12,000 00
Leaving to be accounted for, from sales of old stock, this amt		$12,000 00
Suppose sales of old stock to have been at cost price	$10,000 00	
At an average profit of 20 p. ct., making	2,000 00	
Making sales of old stock		$12,000 00
And making total sales by average of McFreely's estimate		$24,000 00
Now the appraised value of goods in the hands of the receiver is put at $3,831.66, which McKenney says cost about double, to wit		7,763 32
Add to this cost-price of old stock supposed to be sold, viz.		10,000 00
Making the cost-price of McFreely & Hopper's goods to be.		$17,763 32

So if you put the sales of the new stock at 50 p. ct. profit, and the sales of the old stock at par, the result will be the same, nearly, to wit:

Cost-price of new stock, say	$9,000 00
Average profit, 50 p. ct	4,500 00
Cost-price of old stock, sold at cost	10,000 00
	$24,500 00

Sales of the new firm to the amount of $24,000.00, with goods on hand, when they closed, at a cost-price of $7,763.32, can be accounted for in no other way than by estimating the old stock at $18,000.00; and the evidence goes a great way to show that fact.

There is also evidence to show that $2,948.31 of assets of the new firm were applied to the liabilities of the old firm, and Wm. McKenney believes, from facts which came to his knowledge in settling the accounts, that enough more was so applied to make in all $3,700.00, while there is no direct proof that any part of the assets of the old firm was used in paying debts of the new firm. Claim No. 19, of list of claims No. 2, has a credit of $300.00 endorsed, which McFreely says was not paid out of the assets of the new firm, and the fair inference would then be that it was paid from assets of McFreely & Hopper. But supposing that full $4,000.00 were paid by the new firm on the old firm's liabilities, it would still leave the new firm indebted to the old firm about $14,000.00.

An objection, therefore, against the distribution of the assets in equal proportions to the creditors of both firms will come with more
17 show of reason and justice from the creditors of the old firm than the creditors of the new firm. The special auditor has, however, for convenience, made two statements of claims; No. 1, of the claims against McFreely & Hopper, and No. 2, against McFreely, Hopper & Wright, and has brought the interest on all the claims to 1st Jan'y, 1869. He has stated two accounts, in which he has charged the receiver with assets reported amounting to $4,451.41, and has credited him with 10 pr. ct. coms. and other expenses and charges to the amount of $1,071.79, leaving a balance to be distributed among creditors of $3,379.62. In account No. 1 he has allowed claim No. 47 of claim-list No. 1, being the claim of the United States against McFreely & Hopper, in full, by direction of the court, which left a balance of $488.29 to be divided among the other creditors whose claims are allowed, giving to each claim $1\frac{37}{100}$ per cent., which leaves five cents to be paid out of future assets. In account No. 1 he has not allowed at all claim No. 40 on list No. 1, because it is the same with No. 47 allowed in full. In account No. 2 the above balance of $3,379.62 is distributed equally between all the creditors whose claims are allowed, giving to each $8\frac{3}{4}$ per cent., and leaving a small surplus of $6.67 in the hands of the receiver, to be added to future assets. In account No. 2 he has allowed claim No. 40 for dividend, and has disallowed altogether claim No. 47, both of list No. 1.

The auditor has rejected claim No. 47 on the evidence of John H. Thompson, herewith reported. He states that McFreely & Hopper had in their hands funds arising from income-tax, United States licenses, and sales of revenue-stamps entrusted to him for sale and collection as deputy collector of the U. States revenue, for such sum as, with interest thereon from some time in February, 1866, to 2nd Sept., 1866, amounted to $2,537.00, which is the amount of the note constituting claim No. 40; that in Feb'y, 1866, he took to Balto. checks and current

notes to the amount of about $24,000.00, and delivered them to the Nat. Exchange Bank, and got in lieu thereof a certificate of deposit of like amount, payable to the order of the Treasurer of the United States, and remitted the certificate to him. The fair inference is that he got credit at the Treasury Department for the whole amount of the certificate. Among the checks was one for $3,000.00, drawn by McFreely & Hopper to his order, and which embraced, besides the sum due to the United States, a sum due to him on private account. Soon after he had notice from the N. Ex. Bank of the protest of the $3,000.00 check; that he, Thompson, subsequently paid to the bank the full amount of this check out of other collections made by him from internal-revenue collections, and that he was afterwards repaid, by McFreely & Hopper, the difference between the amount of the check and the sum of $2,537.00, less the interest from Feb'y, '66, to 2 Sept., 1866. Now, it appears to the auditor that when the Nat. Exchange Bank honored its certificate of deposit for $24,000.00 deposited by J. H. Thompson, deputy collector, to the order of the Treasurer of the United States, (and there is no evidence that it was not honored,) the United States had no demand on Thompson or any one else for any part of the money represented by the certificate. A certificate of deposit differs materially from an ordinary deposit; it is not divisible, cannot be checked out in parcels, but is payable to the order of the person in whose favor it is drawn upon the return of the certificate itself. When the bank issued its certificate of deposit to the order of the U. S. Treasurer, upon the check of McFreely & Hopper to the order of J. H. Thompson, the issue was made on their credit, and when the check was protested for non-payment they became debtors to the bank for the amount of the check, and not to the U. States, for the latter had been paid. Had the Nat. Ex. Bank refused to pay the certificate on a suit by the U. States to recover, the
18 non-payment of the check would have been no defence to the action; nor can it help the claim of the U. States that Thompson used future collections of internal revenue to redeem the check; all such payments to the bank may give the U. States a valid claim against it. Whatever money was paid by McFreely & Hopper to Thompson on account of this check, amounting to about $500.00, should have been applied by him to the demands of the U. States against himself, and the U. States may have a fair claim against him for the amount of the dividend on claim No. 40; but with that the auditor has no concern. Claims Nos. 4, 20, 32, 51, 52, and 53 of list No. 1 are not sustained by any proof whatever; but there being no objections made, are allowed on the supposition that the necessary proof can be furnished. On the same list there is no proof beyond the certificate of judgments on claims Nos. 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 45, 46, 49, and 50. No. 43 of list No. 1 is proved only by the proof in No. 38, which states that No. 38 was given in bar or collateral security for No. 43, by which it appears that this transaction was an exchange of notes; and as neither the names of McFreely & Hopper nor McFreely, Hopper & Wright appear in No. 43, that claim is not allowed. No. 17 is allowed in full for dividend, altho' the probate states that collaterals have been given to be credited as collected, but against whom and to what amount is not given. Claim No. 42 of list No. 1 is a judgment rendered by a justice of the peace against J. B. Hopper, and there being no proof to show any connection between that claim and either of the firms, is wholly disallowed.

No. 41 of list No. 1 is an account of Norville & Coburn against the firm of McFreely & Hopper; and No. 44 is an account of L. T. Coburn, of the firm of Norville & Coburn, after its dissolution, against McFreely

& Hopper; and No. 4 of claim-list No. 2 is an account of L. T. Coburn against McFreely, Hopper & Wright. McFreely & Hopper have no account or other claim against the firm of Norville & Coburn, nor have McFreely, Hopper & Wright any claim against L. T. Coburn; but the account of McFreely & Hopper against Norville & Coburn, separately, is not only sufficient to cover the account of Norville & Coburn, but also the account of L. T. Coburn against McFreely, Hopper & Wright, and McFreely & Hopper; and as the *b*robates on each of these claims refer to accounts in bar, the auditor has concluded they were intended to apply to the above accounts of McFreely & Hopper against them individually, and these claims are not allowed for dividend. No. 3 of claim-list No. 2 refers by its probate to an account in bar, which, on examination, is found to be $12.65, and the balance thereon is allowed for dividend. No. 1 is not proved, but is allowed. The evidence of Wm. J. McFreely, herewith reported, is to the effect that no part of the money arising from claim Nos. 16, 17, 18, 19, 20, and 21 of list No. 2 ever passed to the credit or was used for the benefit of the firm of McFreely, Hopper & Wright, and that the credit of $300.00 endorsed on claim No. 19 was not from their assets; but the auditor has nevertheless allowed all those claims for dividend, because Jno. N. Denning proves them in the usual form, and he does not consider that either Denning or the securities to those claims can be prejudiced by any misapplication of the money which they represent by the parties who negotiated the transactions.

The auditor concludes by stating to the court that account No. 1, barring the claim No. 47, of the United States vs. McFreely & Hopper, is stated according to his own judgment, provided that claim is entitled to a preference over others, and that account No. 2 is stated strictly in accordance with his views of propriety and justice. All which is respectfully submitted.

M. BROWN,
Special Auditor.

19 The special auditor omitted to refer to No. 36 on claim-list No. 1; he has allowed said claim for dividend in both accounts, and not as a preference claim, because in his judgment the claimant had not only no right of distress on the property in the hands of the receiver, but no just right at all at that point of time.

M. BROWN,
Special Auditor.

ACCOUNT No. 1.

William McKenney, receiver, in acc. with the assets of McFreely & Hopper, and McFreely, Hopper & Wright.

DR.		CR.
To appraised value of merchandise		3,831 66
" gain on sales of merchandise		282 12
" amount of debts collected		337 63
Total assets reported		$4,451 41

CR.

By 10 pr. ct. coms. on $4,451.41 to receiver, pr. order of court	445 14	
" account of sundry expenses, &c., returned by receiver	344 90	

" amount allowed receiver to pay counsel fee.....		20 00	
" Wm. W. Busteed, acct. for publishing notice to creditors, &c., to appear before auditor.....		4 50	
" John H. Thompson, witness before auditor.....	75		
" Wm. J. McFreely, witness before auditor.....	1 50		
" Wm. D. Wright, witness before auditor.....	4 75		
" Wm. McKenney, witness before auditor.....	75		
		7 75	
Complainants' costs of suit:			
Lloyd Tilghman, solicitor.....	20 00		
S. E. Dyott, late clerk.....	5 30		
James Wooters, present clerk.....	48 90		
T. J. Satterfield, late sheriff.....	40		
		74 60	
" Defendants' costs of suit, viz:			
J. B. Hopper, solicitor.....	10 00		
S. E. Dyott, late clerk.....	2 60		
Jas. Wooters, now clerk.....	12 30		
		24 90	
" Special auditor, for his fee in taking testimony, examining and stating claims, stating accounts, &c.....		150 00	
			1,071 79
To this balance to be distributed among creditors.....			$3,379 62
20			
List No. 1. Claim No. 47. United States vs. McFreely & Hopper, allowed as a preference claim, per order of court..			2,891 33
Balance for distribution equally among other creditors.....			$488 29
Which gives a small fraction less than $1.37 in the hundred dollars, the aggregate amount of other claims being $35,655.54.			

			Amt. audited.	Dividend.
"	"	1.	135 84	1 86
"	"	2.	46 36	63
"	"	3.	887 60	11 16
"	"	4.	63 08	86
"	"	5.	302 74	4 15
"	"	6.	1,692 64	23 18
"	"	7.	277 23	3 80
"	"	8.	690 32	9 46
"	"	9.	560 00	7 67
"	"	10.	70 98	97
"	"	11.	1,021 20	13 99
"	"	12.	874 00	10 74

"	"	13.	153 92	2 11	
"	"	14.	153 23	2 10	
"	"	15.	453 46	6 21	
"	"	16.	160 44	2 20	
"	"	17.	226 82	3 11	
"	"	18.	58 59	80	
Amts. carried forward			$7,738 48	106 00	488 29

			Amt. audited.	Dividend.	Assets.
Amounts brought forward			7,738 48	106 00	488 29
List No. 1.	Claim No.	19.	998 55	13 68	
"	"	20.	1,645 25	22 54	
"	"	21.	176 25	2 41	
"	"	22.	467 78	6 41	
"	"	23.	466 24	6 39	
"	"	24.	691 20	9 47	
"	"	25.	799 17	10 94	
"	"	26.	659 70	9 04	
"	"	27.	729 05	9 98	
"	"	28.	741 40	10 15	
"	"	29.	1,014 30	13 89	

			Amt. audited.	Dividend.	Assets.
List No. 1.	Claim No.	30.	1,012 05	13 86	
"	"	31.	485 60	6 35	
"	"	32.	143 00	1 95	
"	"	33.	57 56	79	
"	"	34.	384 00	5 25	
"	"	35.	1,149 84	15 75	
"	"	36.	59 20	81	
"	"	37.	68 08	93	
"	"	38.	293 60	4 02	
"	"	39.	308 27	4 22	
"	"	40. Not allowed in this account for reasons stated in report.			
"	"	41. " " "			
"	"	42. " " "			
"	"	43. " " "			
"	"	44. " " "			
"	"	45.	2,106 84	28 86	
"	"	46.	470 60	6 45	
"	"	47. Allowed as preferred claim, per order of court.			
"	"	48.	886 62	12 14	
"	"	49.	532 75	7 30	
"	"	50.	213 60	2 92	
"	"	51.	482 04	6 60	
"	"	52.	282 33	3 87	
"	"	53.	252 75	3 45	
"	"	54.	27 73	38	
Total amt. of claims allowed for dividend on list No. 1 and dividends on same			$25,343 83	347 10	

List No. 2.	Claim No. 1.		3 31	05	
"	" 2.		63 50	87	
"	" 3.		4 81	07	
"	" 4.	Not allowed for reasons stated in report.			
"	" 5.		169 21	2 31	
"	" 6.		116 99	1 60	
"	" 7.		40 84	56	
"	" 8.		352 35	4 83	
"	" 9.		328 50	4 50	
Amounts carried forward			$1,079 51	13 79	488 29

		Amt. audited.	Dividends.	Assets.
Amounts brought forward		1,079 51	14 79	488 29
List No. 2. Claim No. 10		416 72	5 70	
" " 11.		89 72	1 23	
" " 12.		231 84	3 17	
" " 13.		117 41	1 61	

22		Amt. audited.	Dividend.	Assets.
List No. 2. Claim No. 14.		158 94	2 18	
" " 15.		707 23	9 69	
" " 16.		1,296 60	17 76	
" " 17.		1,206 31	16 52	
" " 18.		763 35	10 45	
" " 19.		1,213 85	16 63	
" " 20.		1,180 48	16 17	
" " 21.		724 75	9 93	
" " 22.		1,125 00	15 41	
Total claims allowed in list No. 2, and dividends on same		$10,311 71	141 24	
Add total claim in list No. 1 for dividend and dividends on same		35,343 83	347 10	
		35,655 54	488 34	488 29
Assets overpaid, 5 cents				05
Add No. 47 of list No. 1, allowed as a preference claim		2,891 33		
		$38,546 87		

M. BROWN,
Special Examiner.

ACCOUNT NO. 2.

William McKenney, receiver, in acc. with the assets of McFreely & Hopper and McFreely, Hopper & Wright.

DR.	CR.
To appraised value of merchandise, as per report	3,831 66
" gain on sales of merchandise, as per report	282 12
" amount of debts collected, as per report	337 63
	$4,451 51

CR.

By 10 pr. ct. coms. on $4,451.41 to receiver, per order of court		445 14	
" acct. of sundry expenses, &c., returned by receiver		344 90	
" amt. allowed receiver to pay counsel fee		20 00	
" Wm. W. Busteed, acct. for notice to creditors to appear before auditor		4 50	
" John H. Thompson, as witness before auditor		75	
" Wm. J. McFreely, as witness before auditor	1 50		
" Wm. D. Wright, as witness before auditor	4 75		
23 By Wm. McKenney, as witness before auditor	75		
		7 75	
"Complainants' costs of suit, viz:			
Lloyd Tilghman, solicitor	20 00		
S. E. Dyott, late clerk	5 30		
James Wooters, now clerk	48 90		
T. J. Satterfield, late sheriff	40		
		74 60	
"Defendants' costs of suit, viz:			
J. B. Hopper, solicitor	10 00		
S. E. Dyott, late clerk	2 60		
Jas. Wooters, now clerk	12 30		
		24 90	
"Special auditor, for his fee in taking testimony, examining and stating claims, stating accounts, &c		150 00	
			1,071 79
To this balance to be distributed in equal ratio among all the creditors			$3,379 62

Which gives a small fraction above 8¾ c. pr. hundred dollars to each claimant, the aggregate amount of all the claims allowed being $38,546.87.

	Amt. audited. Dolls. Cts.	Dividend. Dolls. Cts.
List No. 1. Claim No. 1.	135 84	11 89
" " No. 2.	46 36	4 06
" " No. 3.	887 60	77 67
" " No. 4.	63 08	5 52
" " No. 5.	302 77	26 50
" " No. 6.	1,692 64	148 11
" " No. 7.	277 23	24 26
" " No. 8.	690 32	60 41
" " No. 9.	560 00	49 00
" " No. 10.	70 98	6 21
" " No. 11.	1,021 20	89 36
" " No. 12.	784 00	68 60
" " No. 13.	153 92	13 47
" " No. 14.	153 23	13 41

"	"	No. 15.	453 46	59 68	
"	"	No. 16.	160 44	14 04	
"	"	No. 17.	226 82	19 85	
"	"	No. 18.	58 59	5 13	
"	"	No. 19.	998 55	57 38	
"	"	No. 20.	1,645 25	143 96	
"	"	No. 21.	176 25	15 42	
"	"	No. 22.	467 78	40 93	
Amounts carried forward			$11,026 31	964 86	3,379 62

24

			Amts. audited.	Dividends.	Assets.
Amounts brought forward			$11,026 31	964 86	3,379 62
List No. 1.	Claim	No. 23.	466 24	40 80	
"	"	No. 24.	691 20	60 48	
"	"	No. 25.	799 17	69 93	
"	"	No. 26.	659 70	57 73	
"	"	No. 27.	729 05	63 80	
"	"	No. 28.	741 40	64 88	
"	"	No. 29.	1,014 30	88 75	
"	"	No. 30.	1,012 05	88 56	
"	"	No. 31.	485 60	42 49	
"	"	No. 32.	143 00	12 52	
"	"	No. 33.	57 56	5 04	
"	"	No. 34.	384 00	33 60	
"	"	No. 35.	1,149 84	100 61	
"	"	No. 36.	59 20	5 18	
"	"	No. 37.	68 08	5 96	
"	"	No. 38.	293 60	25 69	
"	"	No. 39.	308 27	26 98	
"	"	No. 40.	John H. Thompson 2,891 33	252 99	
"	"	No. 41.	Not allowed for reasons stated in report.		
"	"	No. 42.	" " "	"	
"	"	No. 43.	" " "	"	
"	"	No. 44.	" " "	"	
"	"	No. 45.	2,106 84	184 35	
"	"	No. 46.	470 60	41 18	
"	"	No. 47.	United States, not allowed in this account.		
"	"	No. 48.	886 62	77 58	
"	"	No. 49.	532 75	46 62	
"	"	No. 50.	213 60	18 69	
"	"	No. 51.	482 04	42 18	
"	"	No. 52.	282 33	24 71	
"	"	No. 53.	252 75	22 12	
"	"	No. 54.	27 73	2 43	
Total am't of claims allowed for dividend on list No. 1 and dividends on same			$28,235 16	2,470 71	
List No. 2.	Claim	No. 1.	3 31	29	
"	"	No. 2.	63 50	5 56	

"	"	No. 3.	4 81	42
"	"	No. 4. Not allowed for reason stated in report.		
"	"	No. 5.	169 21	14 81
"	"	No. 6.	116 99	10 24
"	"	No. 7.	40 84	3 57
"	"	No. 8.	352 35	30 83
"	"	No. 9.	328 50	28 74
"	"	No. 10.	416 72	36 46

25

			Amts. audited.	Dividends.	Assets.
List No. 2.	Claim	No. 11.	89 72	7 85	
"	"	No. 12.	231 84	20 28	
"	"	No. 13.	117 41	10 27	
			$1,935 20	169 32	3,379 62

			Amts. audited.	Dividends.	Assets.
Amounts brought forward.....			1,935 20	169 32	3,379 62
List No. 2.	Claim	No. 14.	158 94	13 91	
"	"	No. 15.	707 23	61 88	
"	"	No. 16.	1,296 60	113 45	
"	"	No. 17.	1,206 31	105 55	
"	"	No. 18.	763 35	66 79	
"	"	No. 19.	1,213 85	106 21	
"	"	No. 20.	1,180 48	103 29	
"	"	No. 21.	724 75	63 41	
"	"	No. 22.	1,125 00	98 43	
Total claims allowed in list No. 2, and dividends on same.....			10,311 71	902 24	
Add claims allowed in list No. 1, and dividends on same			28,235 16	2,470 71	
Aggregate am't of claims in lists Nos. 1 and 2, and dividends on same.....			38,546 87	3,372 95	
By surplus in hands of receiver.....				6 67	
				3,379 62	3,379 62

M. BROWN,
Special Auditor.

And on the same day the following interrogatories and answers thereto were filed by the special auditor:

Circuit court for Queen Anne's County, in equity.

WM. J. McFREELY
vs.
JOHN B. HOPPER AND W. D. WRIGHT.

Interrogatories to be proposed to John H. Thompson, a witness for the United States:

1st. Do you know the parties to this suit, or any of them, which of them, and how long have you known them?

2d. Have you or not any knowledge touching the agreement or understanding between John B. Hopper, William J. McFreely, and William D. Wright, in relation to the business carried on by them in the name and style of McFreely, Hopper & Wright? if yea, state all you know about it.

3d. Did or did not John B. Hopper manage and control the financial business of the firm of McFreely & Hopper?

4th. Have you or not ever been employed in the civil service of the United States of America; if yea, in what capacity, for what period, and where was your office located?

26 . 5th. Have you or not any knowledge of the claim of the United States against McFreely & Hopper; if yea, state in what the items of said claim consist, what is the amount thereof, and when was it incurred?

6th. Were or were not these transactions had between Mr. Hopper and yourself carried on in the name and on behalf of the firm of McFreely & Hopper?

7th. At the time of these transactions with Mr. Hopper, as you have stated, had he any knowledge as to the ownership of the internal-revenue stamps, money, &c., obtained from ——; if yea, what knowledge had he, and how and from whom was it obtained?

8th. What knowledge had William J. McFeely of these transactions, and from whom and how was it obtained?

9th. In your answer to the 5th interrogatory, you have stated that Mr. McCullough sent a portion of the stamps to McFreely & Hopper directly, and that others were obtained from you; state whether or not you have any knowledge as to the manner in which they came to the possession of Mr. McCullough and yourself, and all you know about it.

GEO. M. RUSSUM,
For U. S.

McFREELY
vs.
HOPPER & WRIGHT.

Answers of John H. Thompson, after being duly sworn, to questions propounded on the part of the U. States:

To the first. Answer. That he has known all the parties for 30 years.

To the second. That he has heard McFreely, Hopper & Wright all speak of the terms of the new partnership, and the reason for forming it, to wit, that the firm of McFreely & Hopper had become embarrassed, and the two partners wanted to wind up its affairs. To enable them to do so, and still continue in business, they proposed to Wm. D. Wright to get the use of his name in forming a new firm, to be called McFreely, Hopper & Wright; Wright consented on condition that an addition be made to his salary as clerk, and that he was not to be responsible for the debts of the new firm, nor be entitled to any part of the profits.

To the third, he answers. J. B. Hopper did; his knowledge is derived from frequent visits to the store; also from deposits at the bank at Easton, and the taking money to Balto. to be paid away for the firm; on all which occasions the money was given to witness by Hopper; witness was book-keeper for nearly 12 months and knows further from that fact.

To the fourth. Witness was deputy collector of internal revenue from March or April, 1863, to 1st Oct., 1866; had temporary offices in Caroline and Talbot Counties, when there on business, but Centreville was his residence and principal place of business.

To the fifth. Witness has some knowledge of the claim of the U. States against McFreely & Hopper. The items consist mostly of sales of internal-revenue stamps, which James T. McCullough, collector of internal revenue for this cong. district, had furnished to witness to sell, and which witness, on account of his frequent absence from Centreville, gave to the firm of McFreely & Hopper to sell; that on a settlement with said firm on account of said sales, they were found in-
27 debted to the amount of $1,500 or $1,600; this was in December, 1865. Many of these stamps had been sent directly by McCullough to McFreely & Hopper, at the request of witness; that the letters containing a list of them on such cases were shown to witness by which he obtained a knowledge of their values. In December, 1865, witness also held checks from various persons for their income-tax and U. S. licenses, in all amounting to $887.00, and endorsed and delivered them to J. B. Hopper, with a request to get them cashed for him, as witness was about to leave home. On his return, Hopper told witness that he had got the checks cashed, and had deposited the amount in bank to the credit of McFreely & Hopper, and which they would pay whenever witness wanted it. Owing to the close of navigation, witness did not want the money till some time in Febry., 1866, when J. B. Hopper gave witness a check of McFreely & Hopper for 3,000.00; this amount included a sum due to witness individually, as well as on the sales of stamps, and the amount of the before-mentioned checks for $987.00; that said check with other checks and current notes to the amount of about $24,000.00 in all, were taken by witness to the Nat. Exchange Bank, and witness obtained a certificate of deposit for the whole amount, payable to the order of the Treasurer of the U. States, and remitted the same to him. Some days after, when witness had returned to Centreville, he received from the Nat. Exchange Bank notice of protest of the $3,000.00 check. Witness from time to time made payments on account of said check to the Nat. Exchange Bank, until in some time in April, when he paid the sum in full, and the check was returned to him; that said payments were wholly made from money collected by him as deputy collector of internal revenue; that the note dated 1st Sept., 1866, drawn by McFreely & Hopper, S. T. Downs, and W. M. Higgins, and payable one day after date to the order of witness, for the sum of $2,537.00, (of which note a copy is filed, and has been shown to witness,) represented the money due the U. States, less the interest from some time in Feby., 1866, to Sept., 1866, and embraced in the $3,000.00 check; that when said note was given to witness he delivered up the $3,000.00 check to J. B. Hopper, the difference between the amount of the check and the amount of the note having been in the mean time paid to witness.

To the sixth. Says they were.

To the seventh. Jno. B. Hopper, from his knowledge of the pecuniary condition of witness, well knew that the money and checks were not his private property. As a matter of course he knew the revenue-stamps belonged to the U. S. Government, and from witness' refusal to allow coms. on their sales in a conversation between them, in which he appealed to Hopper to make the check good, on the ground that the reputation of witness was involved and would suffer if it was not done. During the conversation Hopper said he was aware the money belonged to the U. States and not to witness.

To the eighth. So far as he knows, W. J. McFreely had no knowledge of the details of the transactions between Hopper and witness, but he

must have known that the revenue-stamps held and sold by them were the property of the U. States.

To the ninth. On inquiring at the office of the Comm'r of Internal Revenue, he was informed that it was the practice of the Department to place quantities of stamps in the hands of collectors in the rural districts for the convenience of serving the public, and to take bonds from the collectors for the payment of such as were sold and the return of such as were unsold; witness had the same account from Jas. T. McCullough.

28 W. J. McFREELY
vs.
J. B. HOPPER, W. D. WRIGHT.

Additional interrogatories to John H. Thompson, witness for the U. S.:

1. In your answer to the fifth interrogatory-in-chief, you speak of a note given you by McFreely & Hopper, S. T. Downes, and W. M. Higgins, for $2,537, as being for the money of the U. S.; what, if any, steps have been taken by you to recover the money on said note, and with what result?

GEO. M. RUSSUM,
For U. S.

Jany. 18, 1869. J. H. Thompson, on additional interrogatory by Geo. M. Russum:

To the 1st, witness answers and says, that he instituted suit on said note in the cir. ct. for Q. A. Co., and a judgt. of non-suit was entered in favor of S. T. Downes and W. M. Higgins, who severed in their defence.

W. J. McFREELY
vs.
J. B. HOPPER AND W. D. WRIGHT.

Interrogatories to be proposed to W. J. McFreely, a witness for the United States:

1. Was there any agreement in writing between J. B. Hopper, W. D. Wright, and yourself, as to the terms of the partnership carried on as McFreely, Hopper & Wright?

2d. When you changed the style of the firm to that of McFreely, Hopper & Wright, did or did not the firm of McFreely & Hopper take an account of the stock in hand, and charge the same to or receive payment therefor from the new firm of McFreely, Hopper & Wright?

GEORGE M. RUSSUM,
Atty. for U. S.

WM. J. McFREELY
vs.
HOPPER & WRIGHT.

WM. J. McFREELY being sworn on the part of the United States, to questions by Geo. M. Russum, esq., atty. for U. S.:

To the first. Answer. There was no written agreement between Wm. D. Wright, J. B. Hopper, and witness as to the terms of the partner-

ship between them; there was an addition of $150 per year to the salary of Wm. D. Wright after the formation of the new firm.

To the second. The new firm took an account of stock on hand, but did not charge the same to the new firm, nor did the new firm pay for the same. The stock on hand footed up over $18,000.00, but witness and Wright thought it an excessive valuation, and with consent of witness the figure 8 was erased by Wright and the figure 2 substituted therefor, thereby reducing the stock as taken nearly one-third.

29 Witness finds the stock on hand, as entered on their books, to be $12,633.77; says the stock was taken at cost-price; thinks many of the goods were not worth cost, and there were many errors by overestimating the quantity, and believes $12,633.77 was the full value of the stock on hand; says the assets of the new firm to some extent were applied by Hopper, without the consent of witness and contrary to the agreement between the two, to discharge liabilities of the old firm, but how much he cannot state, and that the assets of the old firm were never applied in payment of the debts of the new firm. It was agreed between witness and Hopper that Hopper should have the exclusive settlement of the business of the old firm, by collecting all claims due and paying its liabilities, and that witness should have entire control of the financial affairs of the new firm, including the purchase of goods; that there should be no intermingling of the assets of the two firms. This rule was not strictly observed; sometimes witness allowed claims against McFreely & Hopper in payment of claims due McFreely Hopper & Wright, and sometimes Hopper did the same thing. An account of sales of the new firm was kept for the year 1866, and as far as kept reached about $18,000.00, and believes if an accurate account had been kept during the continuance of the new firm it would have reached from $23,000 to $25,000. The amount of new stock bought by the new firm, including cash and credit purchases, was about $9,000.00. Thinks all the purchases are entered on the ledger from page 1 to 16 inclusive.

Cross-interrogatories to be propounded to Wm. J. McFreely:

1st. Did or did not John B. Hopper use the name of McFreely, Hopper & Wright on paper not for the use or benefit of that firm; if yea, upon which of the notes filed in this cause was the name of the firm so used?

2d. Was not the note (filed with the auditor) of Wm. J. McFreely, Robt. G. Price, and John F, McFreely, to Jno. B. Hopper, and by him endorsed, for $1,000.00, for the benefit of the firm of McFreely, Hopper & Wright, and the money raised on said note applied for their use.

Answers to cross-interrogatories to Wm. J. McFreely:

To the 1st witness answers and says that Hopper did; he applied cash and credits of the firm of McF., H. & Wright in part payment of a note of McF. & H. for $316 to Jno. S. Cooper, which is one of the notes filed, and which cash and credits are endorsed on said note. A note filed for $1,400.00, dated July 10th, 1866, payable 9 mos. after date to the order of Jno. N. Denning, and signed by S. T. Downes, W. M. Higgins, and McFreely, Hopper & Wright, was not used for the benefit of the firm, and no money arising therefrom; and that the credit of $300 endorsed was not paid out of funds of McF., H. & Wright. Witness says the same in regard to a note dated 11th Jany., '67, and payable 9 mos. after date, in the sum of $1,100, drawn by J. B. Hopper, Joseph Richardson, Thos. Dodd, McF., H. & Wright; also a note for $650, dated Nov. 1, 1866, and payable 90 days after date, signed by J.

B. Hopper, Wm. F. Ford, McF., H. & Wright, and Wm. J. Bryan; also a note dated 27th July, 1866, for $700.00, and payable 11 mos. after date, and signed Lucy Hopper, W. B. Legg, Saml. T. Downes and McF., H. & Wright; also a note for $1,140, dated 11th Jan'y, '67, and payable 12 mos. after —, signed J. B. Hopper, W. B. Legg, Hy. Dodd, and McF., H. & Wright; also a note dated 27th July, 1866, for $1,200, and payable 13 mos. after —, signed W. L. Starkey, W. W. Rhodes, and McF., H. & Wright.

To the 2d he answers and says, said note was for the benefit of McF., H. & Wright, and the money obtained thereon was applied to the use of that firm.

Interrogatories to be propounded to Wm. D. Wright, a witness summoned on 'half of the creditors of McFreely, Hopper & Wright.

1. When, how, and upon what terms was the firm of McFreely, Hopper & Wright formed; was an account of stock taken, and what was its amount? state fully the terms of the partnership.

2. Did the said firm sell any revenue-stamps for or on account of the United States, or any of its revenue officers; and did the said firm receive any money belonging to the United States from J. H. Thompson, deputy collector, or did the said firm ever borrow any money from the said Thompson?

3. Was the money of the firm of McFreely, Hopper & Wright used in payment of the debts of McFreely & Hopper; by whom, and to what extent; and was such application made with your privity and consent?

4. Was it not distinctly understood and agreed, when the firm of McFreely, Hopper & Wright formed, that all the assets of that firm should be exclusively applied to the payment of its debts?

McFREELY *vs.* HOPPER & WRIGHT. } Jan'y 18, 1869.

Wm. D. Wright, a defendant and witness sworn on behalf of creditors of McF., H. & Wright, on interrogatories filed:

To the 1st. Answers and says: The time was 4th day of Jan'y, 1866; witness' name was permitted to be used by McFreely & Hopper, to enable them the better to settle up the old business of that firm; that witness was not to incur any responsibility by so doing; that the business of the new firm was to be conducted under the management of McFreely, and that Hopper was to have the settlement and management of the old firm; an account of stock was taken, which footed up $18,000, about, but which witness did not think accurate, and he believes that about $12,000 would cover its value. The increase of the witness' salary by $150 formed no part of the consideration to the loan of his name; when witness first became clerk, it was the understanding that if he suited the firm his salary was to be increased.

To the 2d. Answers and says: His recollection is not positive, but his best impression is that the new firm did not sell any revenue-stamps at all. The said firm, according to witness' best recollection, did not receive any money belonging to the U. States from J. H. Thompson, deputy collector; has no recollection or knowledge that the firm of McF., H. & W. ever borrowed any money from J. H. Thompson, and does not believe they did.

To the 3d. Answers and says: There were claims against McF. & opper that was settled by McF., H. & Wright; witness in some cases

sold goods of McF., H. & W. in payment of small due-bills of McF. & H., and in all such cases he charged the amount to acct. of McF. & H. There were other debts of McF. & H. paid by McF., H. & Wright, but to what extent and by whom witness does not know; witness never consented to any such use of the funds of McF., H. & W., except so far as he used them himself in that way, and that was always done with privity and consent of McFreely.

To the 4th. Answers and says: It was so understood and agreed, and that the stock on hand was assets of the new firm.

31 Jan'y 18, 1869. Cross-interrogatories to Wm. D. Wright, by J. H. Thompson, in behalf of Geo. M. Russum, for U. States. Please ask Mr. Wright:

1st. If he had known of the payment of any debt of McFreely & Hopper's, by either Mr. McFreely or Mr. Hopper, would he have interfered; and, if not, why would he not?

2d. Was he consulted by either Mr. McFreely or Mr. Hopper as to whether or not he objected to the payment of these debts?

3d. You stated you were opposed to the payment; state why you were.

4th. You say the stock was taken hurriedly, and with a great deal of guess-work; why was this the case; is it usual when one firm buys out another?

5th. Was there any written agreement between McFreely & Hopper and yourself; and, if not, what was the verbal agreement?

6th. What payment did McFreely, H. & Wright agree to pay to McFreely & Hopper for the stock of goods?

7th. Were you in receipt of any portion—the profits of the firm of McF., H. & Wright?

To cross-interrogatories. Answers of W. D. Wright, witness:

To the 1st. Witness answers and says: Such a case never occurred to witness' recollection, and refers to his answer to the 3d interrogatory-in-chief.

NOTE.—This question was objected to by Ll. Tilghman, esq., on the part of creditors of McF., H. & Wright before it was answered.

To the 2d. Was never consulted by either.

To the 3d. Answers and says: His opposition was because such payments violated the agreement.

To the 4th. Answers and says: There was no accurate estimate of the number and value of the hats, caps, shoes, and boots which were kept up-stairs, nor of the quantity of oil, vinegar, &c., in the cellar; believes that the dry-goods were measured, but they were overvalued.

To the 5th. Answers and says: There was no written agreement, and refers to his answer to 1st interrogatory-in-chief.

To the 6th. Answers and says: The stock was taken at the amount appearing on the books, somewhat over $12,000.

To the 7th. Answers and says: He was not.

Wm. MCKENNY, receiver, being sworn by the auditor, April 15, 1869, touching his knowledge of the business of McFreeley & Hopper, and McFreely, Hopper & Wright, says:

That he believes that the funds of McFreely, Hopper & Wright, to the amount of about $3,700, were used in paying the liabilities of McFreely & Hopper. On page 112 of their ledger, their entries show that $2,976.48 were so used, less $28.17, and there has come to his knowledge in settlement of the claims an amount approximating $1,000.00 more. On page 226 of the ledger, for the year 1866, Wm. D. Wright credits

his acct. with the firm of McFreely, Hopper & Wright with $250 for services rend. for that year, and on page 274 he charges the firm of McFreely, Hopper & Wright with $132.00, for services rend. to 6' April, 1867. Has no knowledge that the assets were applied in the business of McFreely, Hopper & Wright, or in payment of the latter firm's debts; believes that the cost-price of the stock of goods which came into his hands as receiver would have nearly doubled the appraisement.

32 The depreciation was because many of the goods had been on hand a very long time, and had been bought at seasons of the highest prices, and there had been a very great decline in general prices; he thinks that perhaps nine-tenths of the stock of goods which came into his hands as receiver were goods which had belonged to the firm of McFreely & Hopper, and being old, were less salable than the new purchases made by McFreely, Hopper & Wright. This accounts for the smallness of stock remaining of the new firm's purchasing, and the large quantity of the old firm's goods being on hand; thinks that $1,200 would be a full estimate of the stock of goods of McFreely & Hopper, taken by the new firm of McFreely, Hopper & Wright.

On the 12th day of May, 1869, the following objections were filed:

Circuit court for Queen Anne's County, in equity.

WM. J. McFREELY
vs.
JOHN B. HOPPER AND WM. J. McFREELY.

The creditors of McFreely & Hopper object to the ratification of account No. 1 of the auditor's report in this cause, for the following reasons:

1st. Because the auditor has not allowed therein the debts due from McFreely & Hopper to their general creditors, mentioned among the proceedings in the cause.

2d. Because the auditor has allowed therein a preference-claim, the debt claimed to be due from the said McFreely & Hopper to the said United States.

3d. Because the auditor in said statement of account has not in a fair and ratable manner distributed the funds in this cause among the various creditors named in the proceedings in the cause.

4th. Because the United States is not a creditor of McFreely & Hopper.

5th. Because the funds distributed by the auditor were the assets of the firm of McFreely, Hopper & Wright, and not of the firm of McFreely & Hopper, who alone were the alleged debtors of the United States.

JOHN B. BROWN,
THOS. J. KEATING,
LLOYD TILGHMAN,
Attys. for Creditors.

In the circuit court for Queen Anne's County, in equity.

WILLIAM J. McFREELY
vs.
JOHN B. HOPPER AND WILLIAM D. WRIGHT.

The United States of America, by George M. Russum, its solicitor,

objects to the ratification of the account stated by the special auditor in this cause, and designated as account —, for the following reasons:

1. Because the auditor has, in said account, allowed to John H. Thompson a dividend on a debt due by McFreely & Hopper to the United States.

2d. Because the auditor has not allowed in said account the debt due by McFreely & Hopper to the United States in full and in preference to all other creditors.

GEORGE M. RUSSUM,
Sol'r for the United States.

33 Circuit court for Queen Anne's Co., in equity sitting.

WILLIAM J. McFREELY
vs.
JOHN B. HOPPER AND WILLIAM D. WRIGHT. } Auditor's report, &c.

The United States of America, by George M. Russum, its solicitor, objects to the ratification of account No. 2 of the auditor's report in this cause, for the following reasons:

1. Because the auditor has not allowed therein the debt due from McFreely & Hopper to the United States, as a preference claim.

2. Because the auditor has allowed therein a dividend to John H. Thompson, upon a debt due from McFreely & Hopper to the United States.

GEORGE M. RUSSUM,
Sol'r for United States.

On the 21st day of May, 1869, the following order was filed:

In circuit court for Queen Anne's County, in equity. May term, 1869.

WM. J. McFREELY
vs.
JOHN B. HOPPER AND WM. D. WRIGHT.

Ordered on hearing, on this 19th day of May, 1869, by the circuit court for Queen Anne's County, in equity, and by the authority thereof, that the objections on the part of the United States of America, preferred by G. M. Russum, esqr., its solicitor, to the ratification of account No. 2, accompanying the auditor's report in this cause, be, and the same are hereby, overruled and set aside, and that objections Nos. 1, 2, 3, and 4, on the part of the creditors of McFreely & Hopper, preferred by their solicitors, Lloyd Tilghman, John B. Brown, and Thos. J. Keating, esqrs., to the ratification of account No. 1, accompanying said report, be, and the same are hereby, affirmed and adjudged good. And, furthermore, it is hereby adjudged and ordered, that account No. 2, accompanying said auditor's report, be, and the same is hereby, ratified and confirmed, and the receiver is directed to pay over accordingly, with a due proportion of interest on the claims allowed, if any such has or shall be received by him, in the funds reported to this court.

JNO. M. ROBINSON.

On the first day of June, in the year eighteen hundred and sixty-nine, the following prayer was offered and filed:

Circuit court for Queen Anne's County, in equity sitting.

W. J. McFREELY
vs.
J. B. HOPPER AND WILLIAM D. WRIGHT.

The United States, by George M. Russum, its solicitor, prays an appeal from the order of the court ratifying account No. 2 of auditor's report in this cause, and rejecting account No. 1 of said report.

GEORGE M. RUSSUM,
Solr. for United States.

MARYLAND, *Baltimore City, ss:*

On this 31st day of May, 1869, before me, the subscriber, a justice of the peace in and for the State and city aforesaid, personally
34 appeared George M. Russum, solicitor for the United States in the above-named cause, and made oath in due form of law that the appeal prayed for by him on behalf of the United States is not taken for delay.

Sworn before

CHARLES P. BREWER, *J. P.*

STATE OF MARYLAND,
Baltimore City, sct:

I hereby certify that Charles P. Brewer, esquire, before whom the annexed affidavit was made, and who has thereto subscribed his name, was, at the time of so doing, a justice of the peace of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore City, this 31st day of May, A. D. 1869.
[Seal's place.]

GEORGE ROBINSON,
Clerk of the Superior Court of Baltimore City.

[U. S. I. R. stamp of 5 cts.]

JUNE 1ST, 1869.—Appeal granted.

On the 17th day of July, in the year 1869, the following opinion was filed:

In the circuit court of Queen Anne's County, in equity.

WM. J. McFREELY
vs.
JNO. B. HOOPER AND WM. D. WRIGHT.

The exceptions filed by the solicitor on the part of the United States to the disallowance of claim No. 47, in second audit, are overruled, for the reasons stated by the special auditor; and the exceptions filed on the part of the creditors of McFreely & Hooper to the allowance of same claim in audit No. 1 are hereby sustained.

JNO. M. ROBINSON.

STATE OF MARYLAND,
Queen Anne's County:

I hereby certify that the foregoing is truly extracted from the record

and proceedings of the circuit court for Queen Anne's County, sitting as a court of equity, in the above-entitled cause.

In testimony whereof I hereto subscribe my name and affix the seal [Seal's place.] of the said court this 2nd day of March, in the year eighteen hundred and seventy.

JAMES WOOTERS, *Clerk.*

[5-ct. U. S. rev. stamp.]

The papers in the aforegoing record were copied in extenso by order of George M. Russum, esquire, the solicitor for the United States.

JAMES WOOTERS, *Clerk.*

35 Circuit court for Queen Anne's County, in equity. May term 1869.

WM. J. MCFREELY
vs.
JOHN B. HOOPER AND WM. D. WRIGHT. } May 13th, 1869.

It is agreed by the undersigned, solicitors representing the general creditors of McFreely & Hooper, and McFreely, Hooper & Wright, named among the proceedings in the cause, that the transcript from the records of the office of internal revenue of the United States, offered before the court as evidence in this cause, by George M. Russum, esqr., attorney for the United States, shall be received and filed, and considered as if the same had been filed as evidence before the auditor, subject to the same exceptions as same would have been subject to before the auditor; and it is admitted on the part of the said George M. Russum, esqr., attorney for the United States, that the certificate of deposit referred to in the testimony of John H. Thompson, a witness before the auditor, was obtained and transmitted by the said Thompson, as deputy collector of internal revenue, to the Treasurer of the United States, and was received by said Treasurer in due course of mail; but it is not hereby admitted by said attorney that the alleged certificate of deposit has ever been paid to the United States.

JOHN B. BROWN.
THOS. J. KEATING.
LL. TILGHMAN.
GEORGE M. RUSSUM.

STATE OF MARYLAND,
Queen Anne's County, sct:

I hereby certify that the aforegoing is truly copied from the original agreement filed in the circuit court for Queen Anne's County, in the case in which William J. McFreely is complainant and John B. Hooper and William D. Wright are defendants; and that the said paper was was not copied and inserted in the record of said case which was heretofore transmitted to the court of appeals of the State of Maryland because the same had been misplaced.

In testimony whereof I hereto subscribe my name and affix the seal [Seal's place.] of the circuit court for Queen Anne's County this eighth day of April, A. D. 1870.

JAMES WOOTERS, *Clerk.*

[5-ct. U. S. rev. stamp.]

36 And now come into the court of appeals here as well the said

United States of America, by George M. Russum, Alexander M. Rogers, its attorneys, as the said John H. Thompson et al., by John B. Brown, Thomas Y. Keating, Lloyd Tilghman, their attorneys, and thereupon, on motion of the said John A. Thompson et al., by their attorneys aforesaid, it is ruled by the court here that the said United States of America assign the errors in the record of proceedings aforesaid, or in passing the order aforesaid so as aforesaid, brought before the court of appeals here for correcting the errors supposed to be therein, or decree by the court of appeals here will be entered against it in default thereof; and the said United States of America, by its attorneys aforesaid, says that in
37 the record of proceedings aforesaid, and also in the passing of the order aforesaid, there is manifest error, in this, to wit: that by the record aforesaid it appears that the order aforesaid, in the cause aforesaid passed, was in favor of the said John H. Thompson et al. against the said United States of America, when by the law of the land that order ought to have been passed in favor of the United States of America against the said John H. Thompson et al.; therefor' in that there is manifest error; and it prays that the order aforesaid, for that error and others, being in the record of proceedings aforesaid, may be reversed, annulled, and held entirely as void; and that it, the said United States of America, may be restored to all things which it hath lost by occasion of the said order; and that the said John H. Thompson et al.
38 may rejoin to the errors aforesaid, and so forth. And thereupon it is ruled by the court of appeals here that the said John H. Thompson et al. join in the errors by the said United States of America above assigned in the record of proceedings aforesaid, or decree by the court of appeals here will be rendered against them in default thereof; and the said John H. Thompson et al., by their attorneys aforesaid, say there is no error in the record of proceedings aforesaid, nor in the passing of the order aforesaid, and they pray that the court of appeals here will proceed to the examination as well of the record of proceedings aforesaid as of the matters aforesaid by the said United States of America above for error assigned, and that the said order may be in all things affirmed, and so forth; thereupon further process of and
39 upon the premises between the parties aforesaid is, by virtue of an act of assembly in such cases made and provided, continued before the court of appeals here until the first Monday in October next; the same day is given to the said parties there then to hear the decree of the court of appeals here of and upon the said premises, and so forth.

And now at this day, to wit, the said first Monday in October, being the third day of the said month, in the year of our Lord one thousand eight hundred and seventy, come again into the court of appeals here the parties aforesaid, by their attorneys aforesaid.

Whereupon as well the record and proceedings aforesaid and the order passed in form aforesaid, as the matters aforesaid by the said United States of America above for error assigned, being seen and by the
40 court of appeals here fully understood, and mature deliberation thereupon had, for that it appears to the court of appeals here that there is no error in the record of proceedings aforesaid nor in passing the order aforesaid: Therefore it is considered by the court of appeals here that the order aforesaid, passed in form aforesaid, be in all things affirmed with costs, and stand in full force and effect, the said causes for error above assigned and alleged in anywise notwithstanding.

Thereupon the court of appeals of Maryland filed its opinion and decree in the words following, to wit:

THE UNITED STATES OF AMERICA
vs.
THE CREDITORS OF MCFREELY AND HOPPER.

41 MILLER, *Judge.*

The proceedings in this cause may be regarded, so far as the decision of the question presented by this appeal is concerned, as having been instituted for the purpose of distributing amongst their creditors the assets of the insolvent firm of McFreely & Hopper. The claim of the appellants, the rejection of which is entitled to priority over all others, is the only matter now before us for review, appears from the evidence in support of it to rest upon facts substantially as follows:

John H. Thompson, a deputy collector of internal revenue for the first district of Maryland, intrusted to this firm revenue-stamps for sale, and also endorsed to them for collection checks he had received from various parties for income-taxes and licenses. They sold the stamps, col-

42 lected the checks, and deposited the money from time to time in bank to their own credit, with the knowledge and consent of Thompson, and under promise to pay it over to him whenever he wanted it. The principal sum now claimed, of $2,537, was found due by them on a settlement between Thompson and the firm in December, 1865; and when he called on them for it some time in February, 1866, they gave him their check on a Baltimore bank for $3,000, which included the $2,537 and a sum due Thompson individually. This, with other checks and current notes, amounting in all to about $24,000, were taken by Thompson to the National Exchange Bank, and he obtained on them from that bank a certificate of deposit for the whole amount, payable to the order of the Treasurer of the United States, which he duly re-

43 mitted to that officer; and it was admitted in argument that it was received by him, was paid by the bank, and the amount thereof duly credited on the account of the collector in the office of Internal Revenue at Washington. Some days afterwards the $3,000 check of McFreely & Hopper was protested, and Thompson then from time to time made payments to the bank on account thereof until some time in April, 1866, when he paid the sum in full, and the check was returned to him; these payments were wholly made by him out of other money collected by him as deputy collector of internal revenue. Subsequently, on the 1st of September, 1866, Thompson took from this firm their note, with two sureties, for $2,537, representing the money due the United States, and returned to them the $3,000 check, the difference between the

44 note and the check having in the mean time been paid to him by the firm. There was proof that the firm knew at the time they received the stamps and checks for taxes they did not belong to Thompson as his private property, and that the money they received therefrom belonged to the United States, and not to Thompson; but it is not pretended that any part of the funds distributed in this case can be identified as the money so received.

Whether it is possible from the transaction to make out the relation of debtor and creditor between this firm and the United States, so that the debt shall be entitled to the priority created and established by the 5th section of the act of Congress of 1797, chapter 20, as construed by the Supreme Court in the case of The United States vs. Blight's

45 Assignees, 2 Cranch, 358, is a question that need not now be decided,

because we are satisfied that any claim the United States may have ever had against this firm, growing out of these dealings with Thompson, has been paid and extinguished. The check that the firm gave Thompson for $3,000, covering the amount of the claim now in dispute, constituted part of the $24,000 paid by the bank to the Treasurer of the United States on its certificate of deposit for that amount. When the bank issued this certificate it did so in part on the faith and credit of this check, and assumed, as between the United States and itself, the obligation to pay, and did pay, the full amount of that certificate. By this means any claim the United States may have had against this firm was paid and satisfied, and from thenceforth the bank became
46 the creditor of the parties (drawers and endorser) to this $3,000 check, and the latter became the debtors of the bank therefor when it was protested. It can make no difference as respects the extinguishment of this claim, as between the United States and this firm, that Thompson subsequently used other money collected from internal revenue in paying the bank and redeeming this check. This use of subsequent collections might give rise to a claim by the United States against the bank by the same process of reasoning and upon the same ground that the claim against this firm is supposed originally to have stood, but it cannot by possibility operate to revive this claim that has once been fully paid and satisfied to the United States. Nor does
47 it matter in this respect what may have been the state of accounts between the United States and the collector at the time the certificate of deposit was issued and paid, or what application the Treasurer may have made of the money. It suffices for all purposes of this case that the money was duly paid over to and received by the United States.

The order ratifying the account which rejects this claim must therefore be affirmed.

Order affirmed.

UNITED STATES OF AMERICA
vs.
JOHN H. THOMPSON ET AL., CREDITORS OF Wm. J. McFreely and John B. Hopper.

Court of appeals of Maryland, October term, 1870.

The appeal in this case, standing ready for hearing, was argued by counsel for the respective parties, and the proceedings have since been considered by the court.

48 It is thereupon, this second day of February, 1871, by the court of appeals of Maryland, and by the authority thereof, adjudged and ordered, that the order of the circuit court for Queen Anne's County, in equity, dated the 19th of May, 1869, from which this appeal was taken, be, and the same is hereby, affirmed, with costs.

JAMES L. BARTOL.
JAMES A. STEUART.
RICHARD GRASON.
R. H. ALVEY.
OLIVER MILLER.
GEORGE BRENT.

And afterwards, to wit, on the fourth day of June, eighteen hundred and seventy-four, the said United States of America, by its attorneys aforesaid, filed in the court of appeals here its petition for a writ of error, which is in the words following, to wit:

49 THE UNITED STATES OF AMERICA }
vs. }
JOHN H. THOMPSON AND OTHERS, CREDITORS OF }
Wm. J. McFreely and John B. Hopper. }

To the Hon. James Lawrence Bartol, chief judge of the court of appeals of Maryland:

The petition of the United States of America, by George M. Russum and Alexander H. Rogers, their attorneys, respectfully shows unto your honor that heretofore, to wit, at the October term for the year 1870, of the said court of appeals, in a suit therein depending between the said United States, appellant, and John H. Thompson and others, the
50 creditors of the said Wm. J. McFreely and John B. Hopper, the appellees, the said court rendered a judgment in favor of the said appellees; that the said court is the highest court of the State of Maryland in which a decision in said suit could be had, and that said judgment is final; and that in said judgment there is drawn in question the validity of a statute of the United States, and said decision is against the validity thereof. And also that in the same judgment is drawn in question the construction of a statute of the United States, and the said decision is against the right, title, and privilege specially set up and claimed by the United States in the said suit and civil action under said last-mentioned statute. Your petitioners therefore pray the allowance of a writ of error to the Supreme Court of the
51 United States, to its next term, in order that the said judgment may be re-examined in that court, and be reversed or affirmed, as law and justice may require.

GEO. M. RUSSUM,
A. M. ROGERS,
Attorneys for the United States.

STATE OF MARYLAND, *sct.:*

It is hereby ordered, this fourth day of June, A. D. 1874, that the said writ of error prayed by the petitioners shall issue as prayed.

JAMES L. BARTOL,
Chief Judge of the Court of Appeals of Maryland.

And thereupon, on the seventeenth day of August, 1874, the said
52 United States, by its attorneys aforesaid, produced to the court of appeals here the writ of the United States of America for the correction of errors issued from the circuit court of the United States for the fourth circuit, district of Maryland, of and upon the premises, commanding the record of the proceedings and decree last aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States of America; which said writ is in the words following, to wit:

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

The President of the United States of America, to the judges of the court of appeals of the State of Maryland, greeting:

53 Because in the record and proceedings, as also in the rendition

of the judgment of a plea which is in said court before you, be-
[SEAL.] tween the United States, appellant, and John H. Thompson and
others, the creditors of Wm. J. McFreely and John B. Hopper,
appellees, a manifest error hath happened, to the great damage of the said United States, as by its complaint appears; and because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the United States and
John H. Thompson and others, wherein was drawn in question the
54 validity of a statute of the United States, and said decision is
against the validity thereof; and also that in the same judgment is drawn in question the construction of a statute of the United States, and the said decision is against the right, title, and privilege specially set up and claimed by the United States in the said suit and civil action under said last-mentioned statute, a manifest error hath happened, to the great damage of the said United States, as by its complaint appears: We, being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein given, *that* then, under
your seal, distinctly and openly, you send the record and pro-
55 ceedings aforesaid, with all things concerning the same, to the
Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, this fourth day of June, in the year of our Lord one thousand eight hundred and seventy-four.

Issued the 4th day of June, 1874.

56 JAMES W. CHEW,
Clerk Circuit Court for Maryland District.

And afterwards, to wit, on the seventeenth day of August, 1874, the said United States of America, by its attorneys aforesaid, filed in court here the following citation, service, and return thereof, in the words following, to wit:

THE UNITED STATES OF AMERICA, *set.:*

To Wm. S. McFreely, John B. Hopper, and William D. Wright; to William McKenny, receiver of the firm of Wm. J. McFreely and John B. Hopper; and to John H. Thompson, and all and singular the other creditors of the said firm, named among the proceedings in the
57 case of Wm. J. McFreely vs. John B. Hopper and Wm. D. Wright, circuit court of Queen Ann's County, in equity:

You are hereby cited to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October, in the year A. D. 1874, pursuant to the writ of error filed in the clerk's office of the court of appeals of Maryland, wherein the United States of America are plaintiffs, and all and singular the other creditors of the firm of Wm. J. McFreely and John B. Hopper, named

among the proceedings of the cause of Wm. J. McFreely vs. John B. Hopper and William D. Wright, are defendants in error, to show cause, if any there be, why the said judgment in the said writ of error
58 mentioned should not be corrected, and speedy justice done to all parties in that behalf.

Witness the honorable James L. Bartol, chief judge of the court of appeals of Maryland, this 4th day of June, in the year of our Lord 1874.

JAMES L. BARTOL,
Chief Judge of the Court of Appeals of Maryland.

STATE OF MARYLAND,
City of Baltimore:

On this 6th day of August, A. D. 1874, personally appeared before the undersigned, clerk of the circuit court of the United States for the fourth circuit in and for the Maryland district, and ex-officio United
59 States commissioner, Mr. Robert H. Goldsborough, deputy United States marshal of the Maryland district, and made oath, in due form of law, that he, the said Robert H. Goldsborough, heretofore, to wit, on July 30th, 1874, at Chestertown, in the said State, served the within instrument of writing (being a citation in error) upon William J. McFreely, named therein; and afterward, to wit, on July 31st, A. D. 1874, at Centreville, in said State, served the same citation upon Lloyd Tilghman, esquire, John B. Browne, esquire, and Thomas T. Keating, esq., severally named in the same, and solicitors representing all and singular the general creditors (except the United States) of McFreely and Hopper, and McFreely, Hopper and Wright, named among the proceedings
60 in the cause wherein the same citation was issued, and also on the said last-mentioned day and year, at Queenstown, in the said State, served the same upon William McKenny, esquire, (named also therein,) and that each of said services was made by reading the same citation to each of the aforementioned persons, and delivering to him an exact copy of the same, and notifying to him that the same was done as and for the purpose of a service of the same instrument in writing.

And at the same time personally appeared before the undersigned Mr. Charles A. Bishop, a deputy marshal of the United States for the Maryland district, and made oath, in due form of law, that, on
61 the fifth day of August, A. D. 1874, at the city of Baltimore, he served the aforementioned instrument in writing upon William D. Wright, (named in the aforementioned proceedings,) and that such service was made in the manner and form hereinbefore stated in this affidavit.

[SEAL.]

JAMES W. CHEW,
Clerk Circt. C. & U. S. Commissioner ex-officio.

In pursuance whereof, and according to the form and effect of the act of Congress of the United States of America in such case made and provided, a transcript of the record and proceedings of the decree last aforesaid, to as aforesaid rendered, with all things concerning the same, together with the said writ of error are hereby transmitted to the said Su-
62 preme Court of the United States of America accordingly, &c.

JAMES S. FRANKLIN, *Clerk.*

MARYLAND, *sct:*

I, James S. Franklin, clerk of the court of appeals of Maryland, do hereby certify that the aforegoing is truly taken from the record and proceedings of the said court of appeals.

In testimony whereof I hereto set my hand as clerk and affix the seal of the said court of appeals this twenty-fourth day of August, A. D. 1874.

[SEAL.]

JAMES S. FRANKLIN,
Clerk Court of Appeals of Md.

(Indorsement on cover:) No. 131. The United States, plaintiffs in error, vs. John H. Thompson & others, creditors of William J. McFreely and John B. Hopper. Maryland court of appeals. Filed 13th October, 1874.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES
v.
JNO. H. THOMPSON ET ALS. } No. 131.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

Brief for the Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES
v.
JNO. H. THOMPSON ET ALS. } No. 131.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT.

Proceedings were initiated in this cause by a bill in equity filed April 6, 1867, by Wm. J. McFreely in the circuit court of Queen Anne's County, Maryland, setting forth that the complainant had for more than six years then last past been a partner with one John B. Hopper; that they had been, during that time, and were at the date of the bill, doing business at Centreville, in said county; that their firm-name was first McFreely & Hopper, and afterward McFreely, Hopper & Wright; (same firm.) that Hopper had grossly mismanaged the affairs of the concern, ruined its credit, incurred liabilities to a large and unknown amount, so that it became necessary to go

into liquidation; to which end he prayed for the appointment of a receiver to take charge of the books and assets of the firm, that the partnership property might be applied to the payment of the partnership-debts, without any contest among the creditors for precedence, and with as little expense as possible. (Record, 1–3.)

Wm. McKenney was appointed receiver, as prayed for in the bill, April 6, 1867, (Record, 3.)

Upon the last day of April, 1867, Hopper appeared, confessed the bill, and assented to the appointment of a receiver, (Record, 3, folio 6,) and Wright filed his answer, substantially admitting the essential allegations of the bill. (Record, 4.)

June 25, 1868, Madison Brown, esq., was designated by the court to act as auditor in this case, to state the necessary accounts requisite for a proper distribution of the assets, and to perform the customary duties of that office. (Record, 5.)

Upon the 9th day of December, 1868, the United States intervened by filing a supplemental or ancillary bill, reciting the appointment of a receiver, and then claiming to be admitted as a preferred creditor of the firm in liquidation for a debt which the court, ratifying the report of the auditor, found, upon the testimony of John H. Thompson, had this origin, viz, that it arose from stamps and funds of the United States deposited with and loaned to McFreely & Hopper by said Thompson, who was a deputy collector of internal revenue for the first district of Maryland, in which he lived, having his residence and principal place of business at Centreville, and temporary offices in Talbot and Caroline counties. Thompson was also, for nearly twelve months, book-keeper for McFreely & Hopper while holding the

office aforesaid. The Internal-Revenue Bureau furnished McCullough (the collector) with stamps, and he sent some of them, from time to time, as requested, to his deputy, Thompson, to be sold by him and accounted for to the Government, and credited in its account against McCullough. During Thompson's frequent and necessary absences from Centreville, Hopper, who managed the financial affairs of his firm, sold stamps, and deposited the proceeds, to the credit of McFreely & Hopper, in the bank at Easton, Md., where they did business. Thompson also indorsed to this firm, for collection only and without receiving their value, the checks by means of which many citizens had paid the Federal taxes assessed upon them; and the proceeds of these checks were likewise so deposited to the credit of this firm.

The reason for this indorsement was that Thompson was about leaving home when he received these checks. Upon his return Hopper told him of the disposition made of them, and promised to pay over their aggregate amount on demand. This was in December, 1865. In February, 1866, such payment was demanded, and Hopper gave Thompson the firm's check for $3,000—upon what bank drawn is not stated, but inferentially it is assumed that it was the one at Easton, where they deposited—of which $2,537 was to cover the funds of the United States which had come into McFreely & Hopper's hands, and the balance to be applied to their indebtedness to Thompson personally. This check, together with checks of other parties, and current funds, representing an aggregate amount of $24,000, was taken by Thompson to Baltimore, and there deposited in the National Exchange Bank, obtaining from the bank in lieu of these checks and funds a certificate of deposit of

like amount, ($24,000,) payable to the order of the Treasurer of the United States, to whom Thompson remitted said certificate. The auditor thence *inferred* that Thompson thereby got credit for the whole $24,000 at the Treasury; but the transcript from the internal-revenue records shows that the account was only kept with McCullough. Upon Thompson's return home to Centreville he received notice from the National Exchange Bank of the protest for non-payment of this check for $3,000 given him by McFreely & Hopper, and by him negotiated at that bank as aforesaid. There is no claim that the protest and notice were not regular and seasonable. Thompson subsequently made good to the bank the full amount of this $3,000 check out of other funds and collections of the United States coming into his hands as such deputy collector of internal revenue. In April, 1866, when he had fully paid the check from this source, it was returned to him. McFreely & Hopper afterward paid Thompson the sum due him individually, being the difference between $3,000 and $2,537, but never did pay the latter sum, representing the funds of the Government which came into their hands in the manner aforesaid, though they delivered to Thompson their note, with sureties, for the same, September 1, 1866. (Record, 23.) McFreely & Hopper well knew this sum to be of the funds and property of the United States. Much the larger part of the amount was derived from the sale of Government stamps sent by the Commissioner of Internal Revenue to McCullough officially, which sales were made by them in Thompson's absence, as aforesaid. It was the practice of the Department thus to place quantities of stamps in the hands of collectors in the rural districts, who dis-

tributed them among their deputies, according to law, for the convenience of serving the public. (Record, 22–24.)

The foregoing account of the transaction is condensed from Thompson's deposition, (*Id.*,) upon which the auditor reports that he rejected the claim of the United States. (Record, 13–14, folios 17, 18, where may be found the auditor's version of Thompson's testimony, being substantially as above.)

The auditor, after stating the facts, goes on to give his conclusions from them, thus: "Now it appears to the auditor that when the National Exchange Bank honored its certificate of deposit for $24,000 deposited by Thompson, deputy collector, to the order of the Treasurer of the United States, (and there is no evidence that it was not honored,) the United States had no demand on Thompson or any one else for any part of the money represented by the certificate. A certificate of deposit differs materially from an ordinary deposit; it is not divisible, cannot be checked out in parcels, but is payable to the order of the person in whose favor it is drawn upon the return of the certificate itself.

When the bank issued its certificate of deposit to the order of the United States Treasurer, upon the check of McFreely & Hopper to the order of J. H. Thompson, the issue was made on their credit, and when the check was protested for non-payment, they became debtors to the bank for the amount of the check, and not to the United States, for the latter had been paid. Had the National Exchange Bank refused to pay the certificate on a suit by the United States to recover, the non-payment of the check would have been no defense to the action; nor can it help the claim of the United States that

Thompson used future collections of internal revenue to redeem the check; all such payments to the bank may make a valid claim against it. Whatever money was paid by McFreely & Hopper to Thompson on account of this check, amounting to about $500, should have been applied by him to the demands of the United States against himself, and the United States may have a fair claim against him for the amount of the dividend on claim No. 40; but with that the auditor has no concern." (Record, 14.)

The firm was utterly insolvent. Admitting the claim of the United States as a preferred debt, the other creditors receive less than 2 per cent. of the debts due them. Rejecting the claim of the Government altogether, the other creditors will be paid less than 9 cents on a dollar.

The counsel for the United States, upon the presentation of the auditor's report to the circuit court of Queen Anne's County, objected to it, because the claim of the United States was not allowed in full, and as a preference, and because the claim due to them was allowed to said Thompson; (Record, 29;) but the objection was overruled by that court, and the report and account No. 2 accompanying the same (rejecting this claim) were ratified and confirmed, and the receiver directed to pay out the funds in his hands accordingly, (*Id.*,) while account No. 1, allowing this claim, was rejected by the court. From this order and decree the United States took an appeal to the court of appeals, which was granted June 1, 1869. (Record, 30.) The decision of the court of original jurisdiction is declared to be based upon the reasons stated by the auditor. (*Id.*)

In the court of appeals the common error was assigned that the judgment below was in favor of Thompson and others; whereas it should have been in favor of

the United States. To the court of appeals there appeared to be no error in the record, nor in the judgment, order, and decree aforesaid; which was therefore affirmed; and this decision is brought here by the present writ of error, the determination being against the claim, as well as against the statute right of priority, set up by the United States.

This case is reported in 33 Md., 575.

ASSIGNMENT OF ERROR.

The plaintiffs assign for error the finding of the court of appeals that there was no error in the record and judgment of the proceedings of the court below; and that "therefore it is considered by the court of appeals here, that the order aforesaid, passed in the form aforesaid, be in all things affirmed with costs, and stand in full force and effect, the said causes for error above assigned and alleged in anywise notwithstanding." (Record, 32, folio 40.)

BRIEF.

The high character of the court of appeals of Maryland entitles its decisions to the great respect with which they are generally received. Only mature reflection, and firm conviction of error on its part, can justify an appeal from its determination; yet these considerations did not lead the counsel for the United States in that court to acquiesce in the view of this case enunciated in the opinion, found upon pages 33 and 34 of the record, and in 33 Md., 575 *et seq.*; and a careful examination compels the counsel representing the Government here respectfully to submit that a radical mistake led to the rejection of the claim in controversy, and that the

reasons assigned therefor were not only insufficient but were inapplicable to the real merits. This proposition is offered with a confidence which is diminished by nothing, except the fact of its being a dissent from the unanimous conclusion of such a court.

The circuit court of Queen Anne's County not only accepted the report of the auditor, but his inferences and course of reasoning, (Record, 30, near the bottom,) and the same ratiocination was adopted and followed in the court of appeals. We humbly conceive that the error of which we complain had this origin: that the auditor did not determine the question upon those facts which alone pertain to it, but was led astray by extrinsic circumstances which ought not to have affected the issue as to the existence of a claim in behalf of the United States against McFreely & Hopper.

I.

Two questions arise, or the main question may, properly enough, be divided, in order distinctly to state the position of the plaintiffs in error, viz: (1) Did the United States ever have any claim, equitable or legal, against McFreely & Hooper? (2) If so, when, where, how, and by whom was that claim ever paid?

1. Did the United States ever have any claim against this firm? It is to be premised that the question of priority does not now arise, or if it do, only incidentally, because the courts of Maryland did not adjudge that any claim whatever existed, but rejected it altogether, not admitting the Government as a creditor at all.

What was the origin of the claim asserted? Why,

stamps, checks, and funds, which were the exclusive property of the United States, to the amount of about $2,500, came into the hands of McFreely & Hopper, and were applied to the uses and business requirements of that firm. In this connection, it is desired to call attention to a statement found in the opinion filed in the court of appeals, for though it is true that this court can act only upon the record, of which the opinion forms no part, (Rector *v.* Ashley, 6 Wall., 148; Gibson *v.* Choteau, 8 Wall., 317; Ins. Co. *v.* Polleys, 13 Peters, 165,) yet it does state "the course of reasoning which conducted the court to its judgment, and explains the views and motives of the court," (Williams *v.* Norris, 12 Wheaton, 118,) and for that reason is annexed to and sent up with the record. It can properly be resorted to therefore, to ascertain upon what premises of fact the court drew its conclusions of law; and if any legal deduction be made from an assumed state of facts which the record shows affirmatively did not exist, we can easily perceive how the court may have fallen into error. It may be that the mistake to which we shall now refer may not affect a vital part of the case; or it may possibly be deemed important; but, at any rate, it shows that the exact evidence of Thompson did not receive that careful scrutiny which is the best safeguard against mistake of fact and consequent error in law. The opinion states (Record 53, folio 42, beginning) that "they (McF. & H.) sold the stamps, collected the checks, and deposited the money, *from time to time*, in bank, to their own credit, *with the knowledge and consent of Thompson*, and under the promise to pay it over to him whenever he wanted it." Now, refer to Thompson's testimony. (Record 23, "answer to the fifth" question.) He does not

state that there was ever but *one* delivery of checks, and that made because he was about to leave town and could not present them at the bank on which they were drawn probably that at Easton. It does appear that McFreely & Hopper were accustomed to sell stamps for Thompson in his necessary absence, and that the collector of internal revenue for that (first) district sometimes sent them direct to the firm, at Thompson's request; but it nowhere appears that Thompson ever knew or consented *in advance* (as the opinion obviously implies) that the proceeds should be deposited in bank to the credit of the firm, or that this was ever done except on the single occasion of his absence in December, 1865. He swears that he indorsed the checks and asked Hopper to get them cashed *for him*, T.; and that it was "on his return" that he first learned from Hopper that the deposit was made to the credit of McFreely & Hopper. The mischief had then been done, and all that remained for Thompson was to withdraw the funds from their hands as best he could. His right to demand them, or that of the Government, was the same in February, 1866, as in December, 1865.

To return, now, from this digression, to the origin of this debt. The evidence shows that it was customary to send to the collectors in the rural districts stamps to be by them sold and distributed. (Record, 24.) Such delivery, by the Commissioner of Internal Revenue, "without prepayment therefor," to the assessor and collector of any district, or to any assistant United States treasurer, designated depositary, or postmaster, is authorized by the act June 30, 1864, c. 173, § 170, (13 Stats.,297–8) which also makes it "the *duty* of such collector to supply his deputies with" such stamps. The stamps, then, were prop-

erly in Thompson's hands. He did not, correctly speaking, (so far as third parties were concerned) hold them as a trustee for the United States; but, in his official custody, they were in the possession of the United States, precisely as they were while in the Treasury building in this city, under the special care of the Commissioner of Internal Revenue and of his subordinates here. "True," the deputy collector, as to these stamps and his receipts therefrom and from the internal taxes committed to him to collect, "holds an office of trust, but he does not hold the property as trustee. He is a mere depositary and has no interest in, or title to, the property whatever." (Piscataqua Ins. Co. *v.* Hill, 60 Maine, 183.) By its officers alone can the United States possess its property and exercise its functions. "In doing this *their* acts and possession are its own, not constructively, as in the case of agents of persons, but actually. In this respect corporations differ from persons. In one, the act or possession of the agent is *constructively* that of his principal; in the other it is *actually* so. There may be a limit to the application of this principle," &c. (Pettingill *v.* Androscoggin R. R. Co., 51 Maine, 373; Sprague *v.* Steam Nav. Co., 52 Maine, 592.)

We mean by this, that McFreely & Hopper, in taking these stamps and selling them in Thompson's absence took them from the United States; and that such action being illegal, it was a wrongful taking.

The stamps in Thompson's hands, then, were in the possession of the United States, with unimpaired title. They were there for the purpose of sale. His official duty to safely keep these stamps, to sell them for cash, and to account for the proceeds, Thompson could not delegate to anybody else; nevertheless these stamps,

when actually left by him in the hands of McFreely & Hopper, continued to be the property of the United States. It would have, *pro tempore*, frustrated the object in sending them to him had he taken them with him on his travels, had this been feasible; it was, therefore, but a venial offense, if any at all, for him to leave them in the store where he was book-keeper, and where he doubtless kept his office, and to which people resorted, in his absence, to buy stamps; especially as he so left them with the knowledge of the collector. True, McFreely & Hopper had no legal right to sell this property of the United States thus left in their hands; nor could Thompson sell to them, nor they to any body else, on credit. There was no authority to give credit. (School Dist. *v.* Ætna Ins. Co., 62 Maine, 339, and cases cited; Riley *v.* Wheeler, 44 Vt., 189.)

But conceding that Thompson's and the collector's permission to sell the stamps conferred no authority, and that McFreely & Hopper, therefore, had no right to make the sales, and that the deposit of the proceeds to their own credit was tortious, yet this was such a tort as the Government might waive.

"It may be stated in general terms that where one man wrongfully takes another's property, and turns it into money, or money's worth, the latter, although having a clear right to maintain an action as for a tort, may waive the tort, and sue in assumpsit for money had and received." (1 Hilliard on Torts, 4th ed., 40, 41, ch. 1, § 35, and cases cited.

"§ 117. The count for money had and received, which in its spirit and objects has been likened to a bill in equity, may in general be proved by any legal evidence showing that the defendant has received or obtained

possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff." (2 Greenl. on Ev., Redf.'s ed., 98.) Lord Mansfield said this action was, in effect, a bill in equity. (Moses *v.* McFarlane, 2 Burr., 1005.) Facts which would sustain it, then, must be sufficient to support a bill in equity, when (as in the present instance) the proceedings must necessarily be had in a court of chancery.

Practically, however, it can make no difference whether the claim be considered as resting upon the original conversion of the stamps and checks, or (waiving the tort) for the proceeds after they had been sold and negotiated; in either case the United States had a definite, well-grounded claim for precisely the same sum; the only question is, whether that claim has been extinguished or is still existing; and that brings us to the second of the branches into which we divided the discussion.

Johnson v. US., 4 Mason, 425
U.S. v. Wm's, 1 Wall, 175

2. If the Government's claim has ever been paid, it must have been by means of the *protested* check of McFreely & Hopper; that is to say, the debt was paid by a check which was not paid. "A new way to pay old debts."

This species of commercial legerdemain is supposed to have been accomplished through the medium of the certificate of deposit issued by the National Exchange Bank of Baltimore to Thompson, in February, 1866, for $24,000, by him there deposited in currency and checks, including that in controversy.

Ordinarily a check is not payment of the demand for which it is given. It has never been considered more than *prima-facie* evidence of payment, liable to be re-

butted by proof that it was not drawn against funds, or was not paid. (Haines *v.* Pierce, 41 Md., 221; Morgan *v.* Bitzenberger, 3 Gill, 350; Md. Coal Co. *v.* Wingert, 8 Gill, 171; Berry *v.* Griffin, 10 Md., 27; Olcott *v.* Rathbone, 5 Wend., 490; People *v.* Baker, 20 Wend., 602; Bradford *v.* Fox, 38 N. Y., 290; Taylor *v.* Wilson, 11 Metc., 44; Small *v.* Franklin Co., 99 Mass., 280; Manett *v.* Brackett, 60 Maine, 527; 2 Daniel on Neg. Instru., 542, § 1623 *et seq.;* Edwards on Bills, 192; Byles on Bills, 23, &c.)

While this general proposition is not denied, attempt is made to avoid its application to the check mentioned in this case by saying that the National Exchange Bank paid it by the certificate of deposit which it issued, and which was based in part upon this check. The certificate of deposit was a simple acknowledgment of the bank that it had received from a certain person a certain sum, deposited to the credit of the United States. These certificates "in form are substantially simple receipts of the bank for so many dollars, and so are only evidence of indebtedness, like the bank book." (Morse on Banking, 52.) Even if considered as, in effect, promissory notes, rather than receipts, yet, as between the original parties, they are open to the objection of a total or partial failure of consideration, especially where, as here, the deposit was made by one of the agents of the Government in a designated depositary. But suppose the National Exchange Bank would be estopped by this certificate, as against the United States, from denying its reception of the full $24,000, (see Auditor's Report, Record, 14, folio 18,) could this estoppel enure to the benefit of McFreely & Hopper, who were not party or privy to the certificate, so as to preclude proof of the

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fact that they had never made any payment, but only drawn a worthless check? Or, more pertinently, we may ask, Supposing it to be true that the bank did pay the full amount of that certificate ($24,000) to the United States, is there anything in this case, either upon the facts or the law applicable thereto, to preclude us from showing the further truth that part of this deposit of Government funds was made before and part after the date of the certificate? True, John H. Thompson did deposit, of the Government funds in his hands, $24,000 in this designated depositary, and by its certificate of deposit transmitted that precise sum to the Treasurer of the United States at Washington; but (owing to the failure of McFreely & Hopper to meet their check, no doubt) this federal officer in fact deposited with this bank only $21,000 on the day the certificate issued, and the other $3,000 subsequently. Are McFreely & Hopper released from their original obligation because the bank gave Thompson credit for sixty days for this $3,000? If so, then "law hath fallen in our streets and equity cannot enter," though the result be accomplished in the sacred name of law, and through the forms of equity proceedings.

As to this certificate, there was no privity between the parties to it and McFreely & Hopper. Neither in its terms, origin, nor use did it purport to pay the indebtedness of that firm to the United States. It was a document to which there were but three parties: the depositor, acting for his superior, (Thompson;) the depositary, (the bank;) and the person to whose use and credit the deposit was made, viz, the United States. It was only designed to facilitate the transaction of business in which Thompson and the collector, on the one

side, and the United States, on the other, were concerned, as debtor and creditor, by remitting funds to be credited to McCullough, the collector, to whom the stamps, &c., were charged upon general account. (Record, 7–11.) The Treasurer of the United States could not know, nor was it material, in what currency or representative of money Thompson or McCullough made that deposit; nor whether it was to pay for stamps sold to John Smith, or to McFreely & Hopper. So much as was remitted by Thompson upon account of stamps (if any sum were so specially indicated) was, of course, credited to the general account of stamps charged to his superior. As Thompson was only known to the Department as the deputy of the collector, credit would be given the latter. In short, nobody but Thompson knew that McFreely & Hopper gave this $3,000 check, in whole or in part, for stamps; nor did he intend to receive it as payment for the stamps unless it were paid out of the drawer's funds on presentation to the bank upon which it was drawn. Neither Thompson nor the bank proposed that this check should constitute part of the $24,000 remitted, *unless it was paid* according to its tenor; yet the decision of the court of appeals gives to this paper an effect never contemplated by any of the parties to it, and which is diametrically opposed to the justice and equity of the matter.

The mode in which the Government dealt with these internal-revenue agents is not recognized at all by the decision of which we complain. The statute before cited (13 Stats., 297, § 170) directed the Commissioner of Internal Revenue, in appropriate cases, to furnish to the *collector* of any district stamps, &c.; and it is made

Mode of keeping acc. Record, 7–11.
Court recognizes course of business in dept. Peabody v. Stark, 16 Wall., 242; Smyth v. Fiske, 23 Wall., 382; Brown v. Piper, 91 U.S. 42

"the duty of such collector to supply" them to his deputies. The Department only knows the collector. All taxes assessed and all stamps, &c., delivered are charged to him, and he is credited with all remittances, whether made by himself or deputy. (Record, 7–11.) The Department do not profess to keep any account with each *deputy* collector, but treat them in fact, as they are in the eye of the law, as one with the collector. (Crocker on Sheriffs, § 19; Watson *v.* Todd, 5 Mass., 271.) There can be no occasion for a collector or deputy to remit officially except the proceeds of taxes or stamps. Mr. Thompson's remittance, therefore, was credited to his superior, Mr. McCullough. As no specific appropriation appears to have been made, the Treasurer could apply this $24,000, when the certificate of deposit was paid, if paid all, which is not stated, to the satisfaction of any items of McCullough's account that he thought best, ignoring the state of the accounts between McCullough and his deputy, Thompson, of which the Treasurer and Commissioner of Internal Revenue must have been, in fact, ignorant; nor could McFreely & Hopper be heard to say that any particular item of credit was wholly or in part attributable to such an act of fraud on their part as drawing a check upon a bank in which they had no funds to respond.

Still, the fact that the accounts were so kept, and the collector primarily liable personally and upon his bond, would not prevent the Government from pursuing legally any person, official or other, who had obtained possession of its property, wrongfully or otherwise, and had converted the same to his own use, or into money.

We think this cause ought to be determined upon its merits between McFreely & Hopper and the United

States, leaving out of view entirely the transaction between the National Exchange Bank, Thompson, and the United States, to which they were not party. Omit that, and we have the simple proposition—that this firm has received $2,500 worth of the property and moneys of the United States, and has never restored nor paid the same. If this does not constitute the relation of debtor and creditor, we are at a loss to imagine what does. The firm is shown to be utterly insolvent, and all its assets in the hands of a receiver. If the United States is a creditor of such a firm, or of any person so situated, it becomes, *ipso facto*, a preferred creditor.

Nor can it be perceived why the United States should be required to show that "any part of the funds distributed in this case can be identified as the money so received" (Record, 33, folio 44,) from sales of its property by McFreely & Hopper, any more than that every other proving creditor should make the same proof and establish the same connection between the money loaned and the goods sold that firm, and the funds to be distributed. "The identity of money, considered as a debt due, or credit, that is, as a general value in account, does not consist in the identity of the coins or pieces, but in the identity of the fund;" and into whosesoever hands that goes, it may be followed. (United States *v.* Waterborough, 2 Ware, 158, or Davies, 158. See also p. 159, cited *post.*)

II.

We desire now to take another view of this subject. Suppose the United States, having this right of election as to the form of action and as to the person against whom to proceed, chooses to follow McFreely & Hopper—

cannot this be done? Granting that it was wrongful in McCullough and Thompson to entrust the stamps and checks to this firm, and in them to receive and convert the same into money, and the money to their own use; and that there was no precedent authority (as there clearly was not,) to take their check for the amount of the proceeds; yet the United States, waiving all torts, could ratify all these acts, originally unauthorized.

To accomplish the clearly equitable result of making those pay for the stamps who have received money for them, this court may consider the act of Thompson in taking and negotiating McFreely & Hopper's check as the act of his principal, the United States. That check, being given for the property and money of the United States, might have been sent directly to the Treasurer and suit maintained thereon against McFreely & Hopper in the name of the United States, even without its being indorsed by Thompson. (Dugan *v.* United States, 3 Wheaton, 172; United States *v.* Barker, 1 Paine, 156.) But if Thompson's act in taking and negotiating the check is to be deemed the act of his known or undisclosed principal, the United States, then his indorsement of it was their indorsement, and the specious reasoning of the auditor, that McFreely & Hopper's indebtment to the plaintiffs in error was extinguished by the certificate of deposit, falls to the ground.

Reference to the auditor's report reminds us to make further comment upon one passage in it to which we have already alluded. He says, (Record 14, folio 18,) "Had the National Exchange Bank refused to pay the certificate, on a suit by the United States to recover, the non-payment of the check would have been no defense to the claim." *Quære de hoc?* We have already re-

marked that the certificate of deposit, being a mere receipt, (Morse on Banking, 52,) and nowhere ever considered as more than a promissory note, would be open to explanation, or to the defense of partial failure of consideration, as between the original parties. What we now wish to receive the attention of the court is the question whether or no if the United States had sued McFreely & Hopper, in January, 1866, for money had and received by them to the use of the Government, they could have set up the giving of this check, which they have never paid, as a defense to that action. The question is not as to the relations at any time existing between the bank and the United States, but those of the latter with McFreely & Hopper.

Again: the note of September 1, 1866, given by McFreely & Hopper, as principals, with S. T. Downs and W. M. Higgins as sureties, for the precise (principal) sum due to the United States, and solely in consideration thereof, may properly be taken, adopted, and regarded as a note to the United States, and therefore entitled to be proved by the Government, and to have priority. The action of the United States in filing this bill is a repudiation of all acts that would tend to discharge their claim against McFreely & Hopper and an affirmance of the existence of the original claim or of their right to the note which now represents it.

These remarks, under this head, have been submitted for the purpose of enforcing the proposition that, whichever view was taken of the case, the United States had a claim, substantially the same, whether enforceable simply as for money had and received, or upon the written note or contract given for, and which now represents,

that money, if they can be considered as the equitable owners of that paper. My idea is this: if the Government cannot be deemed in equity to be the holders of that note of September 1, 1866, then the fact that it, or the check which preceded it, was taken by Thompson from McFreely & Hopper, cannot destroy nor affect the original claim of the United States against that firm for moneys obtained by the conversion of the Government's property; and that it is, therefore, immaterial upon which of these grounds the claim is presented, since in substance they are identical.

III.

Another somewhat similar suggestion is respectfully submitted, *i. e.*, that the whole transaction, taken together, (as it should be,) entitles the Government (if need be) to set up a claim to stand in the place of Thompson, by a sort of *subrogation.* There is a species of equitable lien upon the note, given for and representing its moneys, from the moment of its execution, September 1, 1866; or, rather, a right to the note and to enforce it against the maker's assets. (Fleming *v.* Beaver, 2 Rawle, 128, 132.)

This right to the note is, more exactly, to be treated as a *resulting trust* arising from the use made of Government funds. We well understand that the cause at bar is not, in its facts, precisely like those in which the doctrine of subrogation has been enunciated and the right enforced. Indeed, in its circumstances, this case is peculiar and *sui generis;* but we do say that the liberal, equitable application to them of the principles upon which the whole theory of subrogation rests will give to the United States a right to enforce payment of its

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debt, whether represented by this note or not, out of the assets of McFreely & Hopper in the hands of the receiver, because the check was paid with its funds. Or, we may apply the law thus: Thompson paid the check of McFreely & Hopper out of the moneys of the United States in his hands, as an official and agent of the United States; hence arose a resulting implied trust, that he would hold the check and its proceeds for the benefit of those with whose funds it was paid; and when the check was surrendered and the note substituted therefor, the same right or trust arose with regard to the latter instrument. We are aware here, too, that questions as to such trusts usually arise as to the purchase of real estate by one person, in his own name, with the funds of another; but there is nothing in the principle upon which the implication of such a trust rests, which can confine its application to matters connected with realty, (nor is it, in fact, ever so restricted,) or prevent the subrogation or substitution in equity of the party really supplying the funds for him in whom is vested the apparent or legal title, as against those liable for or upon the property in question. (1 Smith's Leading Cases in Eq., p. 173.) The distinction between a subrogation and a resulting trust is here disregarded, because it is conceived that they rest upon the same principle; and we are more concerned to establish clearly the equity of the United States, and the relief to which it entitles us, than careful by what name it is administered. If one buys real estate with the funds of another, it is said that a trust results in favor of the latter; while if it is a horse, check, or note that is so bought, the party negotiating the purchase is generally called the agent, but oftentimes the trustee, of him who provides the means; but

All necessary parties before the Court. The makers; their assignee; Thompson, the custodian & claimant; & the U.S., its equitable owner. Immaterial to sureties to whom they pay - or to whom note is paid.

whether they were originally supplied for the purpose of effecting the purchase or not, the property bought, whether real or personal, may be and is alike in equity considered as held in trust by the apparent holder for the benefit of him who provided the means. *Speaking of the moneys of the United States*, in a case hereinbefore cited, Ware, J., said: "When *property of any description* is transferred from one to another, which is affected by a trust, or upon which any lien exists in favor of a third person, and the person to whom it is transferred has notice of the fact, the trust or lien will follow it into his hands. The assignee will be bound by the trust. The property will be subject to the lien to the same extent as before the transfer was made and the possession changed. The assignee will merely succeed to the rights of the assignor, and will be subject to the same duties and liabilities with respect to the property. *This is not only a principle of natural justice*, but one that is familiarly enforced by courts of equity *in a great variety of cases*. (Citing 1 Story's Eq., 533.) If this is a rule with respect to specific property, as real estate or chattels, *it is no less just that it should be applied to money*, so long as its identity is preserved; and its identity as money is preserved so long as it can be followed and distinguished from all other money, not regarding the individual coins or pieces of money, but so long as it can be followed as a separate and independent fund or value, distinguishable from all other funds." (United States *v.* Waterborough, 2 Ware, 159.) If it cannot be so followed and distinguished, nevertheless a claim for its value exists in favor of the true owner, which is sufficient for the purposes of the Government in this case. The stamps came into the hands of McFreely

& Hopper, charged with a trust to account to the United States (directly or through its local agents, the collector and his deputy) for the proceeds; and they are still chargeable with this liability to account, and the Government can claim the note, and use it as a part of the evidence to establish the trust and its precise amount. Again, those stamps were a trust in the hands of Thompson; so were the funds by him received for them. The check could be followed by the United States, as it represented the funds; and so now in this bill in equity against Thompson and all others concerned, the note which now represents the stamps which Thompson in breach of his official duty confided to McFreely & Hopper may and should be treated as the property of the United States, and made the basis of a preferred claim to the assets of the firm in the hands of the receiver. "Where money has been received *mala fide*, it may be followed as a chattel, more especially where it can be distinctly traced." (Goepp's App., 15 Penn. St., 428.)

Pollock v. Pratt, 2 Wash. C.C., 492

"The relation of trustee being once established, must pervade every transaction respecting the trust property until that relation is effectually terminated." * * * * The *cestui que trust* "may follow the property through every mutation whatever, *if the change was effected through the schemes of the trustee*, AND THE PROPERTY COMES BACK TO HIM; and he may demand the *proceeds* where the property is irreclaimable." (De Boice *v.* Sanford, Hoffm. Ch., 194.)

"Whenever a trust-fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the *cestui que trust*. No change of its state or form can divest it of such trust. So long as it can be

identified either as the original property of the *cestui que trust*, or as the *product of it*, equity will follow it." (Thompson's App., 22 Penn. St., 17.) This applies to the conversion by Thompson of the Government's stamps into the note of McFreely & Hopper and others, which he now seeks to prove in his own name and behalf as claim No. 40 in account No. 2, (Record 20,) and which has been so allowed to him by the auditor and the courts of Maryland; which allowance the United States did then and do now assign as error. (Record 29, folios 32–3.) A check given in satisfaction of a judgment, and its proceeds deposited generally in a bank by the attorney collecting the amount of the judgment, were so followed in Virginia. (Overseers *v.* Bank of Virginia, 2 Grattan, 544.) So in Maine, a complainant was held entitled to elect whether he would claim a vessel of which he was mortgagee, fraudulently sold, or the notes given for her by the purchaser to the mortgagor; and he took the notes. The decree was that their proceeds be applied toward the discharge of the complainant's mortgage. Attention is respectfully called to this case, as fully supporting the claim set up in this brief. (McLarren *v.* Brewer, 51 Maine, 402; Bank of North America *v.* Pollock, 4 Edw. Ch., 215; Veil *v.* Mitchell, 4 Wash., C. C., 105.) This case is also to be found, with notes and citations, in 1 Am. Leadg. Cas., 682, *et seq.*, *q. v.*

IV.

If the United States have a claim, either because McFreely & Hopper have never paid for the stamps and checks converted to their use, or as being in equity the owners of the note of September 1, 1866, arising out of this conversion, and to supply the place of Government

funds used to make good their check at the bank; in either event, such claim is entitled to priority.

This right results, necessarily, from the existence of any claim whatever against McFreely & Hopper, and the insolvency and assignment of all of the assets of that firm. (United States *v.* Fisher, 2 Cranch, 385; Harrison *v.* Sterry, 5 Cranch, 289; Hunter *v.* United States, 5 Peters, 181; United States *v.* State Bank of North Carolina, 6 Peters, 29; Lewis *v.* United States, 92 U. S., 618.)

U.S. v. Shelton, 1 Brock, 517 per Marshall, C.J.

That the effect of giving this priority will be to reduce the dividend to the other creditors from nine per cent. to two is no answer to the claim in equity any more than at law; since such must always and inevitably be the result of enforcing this right, which is confined by statute to insolvent estates, because not needed as to solvent persons, who can be made to pay all debts.

Thompson, in paying the check of McFreely & Hopper, had he done this with his own funds, should be considered in equity as the surety of that firm upon their paper and indebtedness to the United States. He, in effect, became their surety when he intrusted the stamps and checks and their proceeds to McFreely & Hopper, and he would and should have been so treated in equity.

The consequence to the other creditors is the same, whether the claim in question be considered as that of the United States or of a surety who has paid the claim of the United States against the principal debtor; since such surety is by statute entitled to the same priority as the Government itself as to bonded debts; and in equity as to simple contracts.

The court of appeals erred then, in any view, in not giving priority to this claim, whether in favor of the Government or of Thompson.

This statute right of priority is based upon the constitutional power of the Government to borrow money, provide for repayment of the loan, and for the general welfare. (United States *v.* Fisher, 2 Cranch, 396.) The reasoning of that case, establishing the necessity and propriety of the United States having and exercising this right, would fully justify the enforcement of it in equity in the manner sought to be accomplished in the present proceedings.

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Priority exists as to equitable debts. Howe v. Sheppard, 2 Sumner, 133, which see.